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# IMPLEMENTATION OF MULTIMODAL TRANSPORT RULES

Report prepared by the UNCTAD secretariat

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## INTRODUCTION

1. The Plan of Action (TD/386) adopted by UNCTAD X, in Bangkok in February 2000, states in paragraph 152, that: "In close cooperation with other relevant international organizations, UNCTAD should continue to undertake studies on the implementation of multimodal transport rules."

2. To prepare the requested study, the secretariat conducted an inquiry into the existing rules and legislation applicable to multimodal transport of goods. A note verbale (dated 14 April 2000) was sent to all member States of UNCTAD inviting them to provide the secretariat with a copy of their national laws/regulations, if any, including other relevant information and documentation which may be used in practice. This document attempts to provide an overview of the existing laws and regulations governing multimodal transportation. It reflects the information received from Governments in response to the note verbale as well as documentation that the secretariat could otherwise obtain from various countries and regional or subregional organizations.

3. In order to provide a clear picture as to the nature and basis of various legislation adopted at the national and regional/subregional level, it may be appropriate to provide a general background for the subject, including problems associated with present practice as well as previous attempts to provide a uniform international legal framework for multimodal transport of goods. As will be seen from the report, the long desired uniformity of law governing the international multimodal transport of goods has not yet been achieved. The subject still occupies the attention of various international and intergovernmental organizations as well as individual Governments. The search for uniformity of law in this important area continues and clearly requires treatment in a global forum on a priority basis.

## Chapter I

## MULTIMODAL TRANSPORT – GENERAL OVERVIEW

### A. What is multimodal transport?

4. The most authoritative definition of the term "international multimodal transport" is provided in article 1 (1) of the United Nations Convention on International Multimodal Transport of Goods 1980 (hereinafter referred to as the MT Convention) which reads as follows:

> " 'International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country..."

5. This definition should be read in conjunction with the definition of the term "multimodal transport operator" (MTO) provided in article 1(2) of the MT Convention, which provides:

> " 'Multimodal transport operator' means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract."

6. Thus, the main features of a multimodal transport are: the carriage of goods by two or more modes of transport, under one contract, one document and one responsible party (MTO) for the entire carriage, who might subcontract the performance of some, or all modes, of the carriage to other carriers.[1] The terms "combined transport" and "intermodal transport" are often used interchageably to describe the carriage of goods by two or more modes of transport.[2]

### B. Background

7. The development of new transportation techniques, such as containerization and other means of unitization of goods in the 1960s, also introduced a significant need for

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[1] The glossary of the terms used in combined transport and related field issued by the United Nations Economic Commission for Europe (UN/ECE), defines "multimodal transport"as "carriage of goods by two or more modes of transport." The glossary is intended for the work of the three intergovernmental organizations, namely the European Community, the European Conference of Ministers of Transport (ECMT) and the UN/ECE. It is, however, specified that the "definitions are not applicable in their strictest sense to the legal and statistical fields, whose relevant documents of reference exist already." See document: TRANS/WP.24/2000/1.

[2] "Intermodal Transport" has been defined as "the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes." "Combined Transport" is defined as "intermodal transport where the major part of the European journey is by rail, inland and waterways or sea and any initial or final legs carried out by road are as short as possible." See document TRANS/WP.24/2000/1.

modification of commercial and traditional legal approaches to transport. Goods stowed in a container could be transported by different means of transport, such as ships, railway wagons, road vehicles or aircrafts, from the point of origin to the final place of destination, without being unpacked for sorting or verification when being transferred from one means of transport to another. Gradually, more and more operators took responsibility for the whole transport chain under one single transport contract. Shippers/consignees needed to pursue one single operator, in the event of loss of, or damage to, the goods involved in multimodal transport, who would be responsible for the overall transport, rather than against several unimodal carriers involved. There was a need for an international legal framework for multimodal transport of goods.

8. In spite of various attempts to establish a uniform legal framework governing multimodal transport[3] no such international regime is in force. The MT Convention has failed to attract sufficient ratifications to enter into force. The UNCTAD/ICC Rules for Multimodal Transport Documents, which came into force in January 1992, do not have the force of law. They are standard contract terms for incorporation into multimodal transport documents. The rules, being contractual in nature, will have no effect in the event of conflict with mandatory law.

9. The lack of a widely acceptable international legal framework on the subject has resulted in individual governments and regional/subregional intergovernmental bodies[4] taking the initiative of enacting legislation in order to overcome the uncertainties and problems which presently exist. Concerns have been expressed regarding the proliferation of individual and possibly divergent legal approaches which would add to already existing confusion and uncertainties pertaining to the legal regime of multimodal transport.

10. A multimodal operation is made up of a number of unimodal stages of transport, such as sea, road, rail or air. Each of these is subject to a mandatory international convention or national law.

## C. International conventions applicable to unimodal transportation

11. International conventions applicable to unimodal transport include:

**Transport by sea**:

- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules);

- Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, (Hague/Visby Rules) 1968;

- Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, as Amended by the Protocol of 1968, 1979;

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[3] See paragraphs 16-40.

[4] See chapters II and III.

- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

**Transport by road:**

- Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956.

**Transport by rail:**

- Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 1980.

- Protocol to amend CIM-COTIF, 1999.

**Transport by air:**

- Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929;

- The Hague Protocol, 1955;

- Montreal Protocol No. 4, 1975;

- The Montreal Convention, 1999.

12. The problem which arises is the extent to which these mandatory conventions applicable to unimodal transportation would also influence contracts where more than one mode of transport is involved,[5] bearing in mind that some of these unimodal conventions also extend their scope into multimodal transport.[6] For example the CMR (article 2), CIM (article 2) and Montreal Conventions specifically include provisions dealing with transport of goods

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[5] See Ramberg J., UNCTAD/ICC Rules for Multimodal Transport Documents: Origins and Contents, *Simposio Maritimo: El Transporte Multimodal Internacional y su Impacto en las Actividades del Transporte Maritimo*, International Chamber of Commerce, Barcelona 2-3 April 1992. See also Mankabady S., The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions, *The International and Comparative Law Quarterly*, Vol. 32, Part 1, January 1983: 123-124.

[6] At a seminar held in London, United Kingdom Law Commissioner Faber D., concluded her presentation by saying: "The multimodal transport industry is investing heavily in improving its services. It is a very sophisticated industry but the same cannot be said of its legal infrastructure. There is a large number of transports conventions which are potentially applicable to any contract. This means that enormous sums, which would be better applied commercially, are spent in legal disputes as to whether the contract terms or a convention and, if so which convention, should apply to govern relations between contracting parties. The best way forward would be to abolish all the individual conventions and introduce one which would govern all transport contracts, by whatever means of transport and whether unimodal or multimodal. This may mean legal expenditure in the short term, while precedents are established for the construction of such a convention, but in the long term it would obviate many of the current problems and save costs." The Problems Arising From Multimodal Transport Law Seminar, 5-7 December 1994, Churchill Inter-Continental, London.

by more than one mode. In any event, in the absence of a uniform liability system for multimodal transport, the liability for each stage of transport is determined by the relevant unimodal convention or national laws which adopt varying approaches to issues such as the liability questions. Therefore, the liability of the multimodal transport operator for loss or damage to goods can differ depending on which stage of transport the loss has occurred. The question becomes even more complicated if the loss or damage cannot be localized, or the loss occurs gradually during the entire transport.

13. Thus, the greatest shortcomings of transport law are considered to be: "the vast differences between the rules governing the different transport modes. Different grounds of liability, different limitations of liability, different documents with a different legal value, different time bars. Where it may perhaps be said that this particularism did not constitute such a formidable problem when unimodal transport was still predominant, its drawbacks become glaringly obvious when attempts are made to combine different transport modes, and, inevitably, their different legal regimes into a single transport operation governed by a single contract."[7]

14. These differences were also singled out by the Commission of the European Communities as one of the main obstacles in the field of trade facilitation. Thus, a Communication to the Council for Trade in Goods of the World Trade Organization state that:

> "The consequence of current arrangements is therefore a patchwork of régimes which fails to capitalize on modern IT-based communications systems and practices, which impedes the introduction and use of a single multimodal waybill/transport document, and which does not reflect fully the increased use of containerized transportation operating across different modes, making mode-specific liability arrangements inappropriate. In cases of loss or damage to goods, this creates uncertainty as to the time of loss/damage, uncertainty as to mode and identity of the carrier; and uncertainty as to the applicable legal regime for liability and its effects."[8]

15. Again, a recent study by the European Commission[9] describes the current legal ability framework in the following terms:

"The present legal framework determining a carrier's liability consists of a confused jigsaw of international conventions designed to regulate unimodal carriage, diverse national laws and standard term contracts. ....As every intermodal transaction is made up of unimodal stages, there are a number of mandatory international liability regimes which are potentially applicable, depending on their scope of application and the stage of transport where a damage or loss occurs. Accordingly, two different regimes may apply to the same claim or the regime

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7 De Wit R., *Multimodal Transport: Carrier Liability and Documentation*. Lloyd's of London Press, 1995, 7.

8 See Issues Relating to the Physical Movement of Consignments (Transport and Transit) & Payment, Insurance and other Financial Questions Affecting Cross-border Trade in Goods, G/C/W/133, 2 December 1998, 3.

9 "International Transportation and Carrier Liability", June 1999, section 1.

which applies can only be identified when it is clear during which stage of the transport a loss/damage occurred. Where the stage of transport during which a loss or damage occurred cannot be identified, where loss or damage occur gradually, or in the course of (value-added) services ancillary to transportation (e.g. warehousing), a carrier's liability will often depend on national laws and/or contractual agreement. As a result, both the applicable liability rules and the degree and extent of a carrier's liability vary greatly from case to case and are unpredictable. Liability for delay in delivery is not always covered by the same rules as liability for loss of or damage to the goods."

## D. Previous attempts to achieve uniformity

16. The establishment of a widely acceptable legal framework for multimodal transport has proved to be a difficult task. The first attempt was made by the International Institute for the Unification of Private Law (UNIDROIT) and dates back as far as to the 1930s. The work within UNIDROIT resulted in the approval, by its Governing Council in 1963, of a "draft convention on the international combined transport of goods",[10] which was later revised by an ad hoc committee of experts. This was followed by the preparation and adoption by the Comité Maritime International (CMI) of a "draft Convention on Combined Transport-Tokyo Rules" in 1969. The draft conventions prepared by UNIDROIT and CMI were combined into a single text in 1970, under the auspices of the Inland Transport Committee of the UN Economic Commission for Europe (UN/ECE), known as the "Rome Draft." This draft was further modified by meetings of the UN/ECE and the Intergovernmental Consultative Organization (IMCO) during 1970 and 1971, and came to be known as the "Draft Convention on the International Combined Transport of Goods", better known as the "TCM draft ", using the French acronym for "Transport Combiné de Marchandises." The TCM draft never went beyond the drafting stage. Its provisions were, however, subsequently reflected in standard bills of lading such as the Baltic and International Maritime Conference's (BIMCO) Combiconbill and in the "Uniform Rules for a Combined Transport Document" of the International Chamber of Commerce (ICC).[11]

17. The UN/IMCO Container Conference, which was to finalize the TCM draft in 1972, recommended that the subject be further studied, particularly its economic implications and the needs of developing countries. UNCTAD was proposed to undertake this task. The Intergovernmental Preparatory Group (IPG) was then set up by the Trade and Development Board (Decision 96 (XII) of May 1973) and, following an extensive investigation, eventually prepared the draft convention leading to the adoption of the United Nations Convention on International Multimodal Transport of Goods 1980.[12]

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10 UDP 1963, E.T.XI.II.DOC.29

11 The ICC Uniform Rules were first issued in 1973 as publication No. 273. They were slightly revised in October 1975 to overcome practical difficulties of application concerning the combined transport operator's liability for delay (ICC Publication No.298). The ICC Rules were conceived as an essential measure to avoid a multiplicity of documents for combined transport operations.

12 For further information see Selvig E., The background to the multimodal convention, paper delivered at a seminar in Southampton University, Faculty of Law, 12 September 1980; See also UNCTAD, The Economic and Commercial Implications of Entry into Force of the Hamburg Rules and Multimodal Transport Convention, TD/B/C.4/315/Rev. 1, 1991, paragraphs. 39-45.

### (i) United Nations Convention on International Multimodal Transport of Goods 1980

18. Although the Convention has not succeeded in attracting sufficient ratifications to enter into force[13], its provisions have significantly influenced the type of legislation enacted in a number of countries/regions.[14] The following are some of the main features of the Convention:

19. The Convention applies to all contracts of multimodal transport [15] between places in two States, if the place of taking in charge or delivery of the goods as provided for in the multimodal transport contract is located in a contracting State (article 2). While the Convention recognizes the right of the consignee to choose between multimodal and segmented transport, its provisions are to apply mandatorily to all contracts of multimodal transport falling within the provisions of the Convention (article 3).

20. The liability of the multimodal transport operator (MTO)[16] for loss of, or damage to, goods as well as delay in delivery is based on the principle of "presumed fault or neglect." That is to say that the MTO is liable if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge, unless the MTO proves that he, his servants or agents or any other person of whose services he makes use for the performance of the contract, took all measures that could reasonably be required to avoid the occurrence and its consequences.[17] This provision is modelled on article 5 (1) of the Hamburg Rules.

21. A key issue in the context of establishing the liability of the MTO for loss of, or damage to, goods has been the choice between the "uniform" or "network" system of liability. Under the "uniform" system the same liability regime is applied to the entire multimodal transport, irrespective of the stage at which the loss or damage occurred. Under the "network" system, the liability of the MTO for localized damage (i.e. damage known to have occurred during a particular stage of transport) is determined by reference to the international convention or national law applicable to the unimodal stage of transport during which the damage occurred.

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13 The Convention was to enter into force one year after ratification or accession by 30 States. As of 15 June 2001 only the following ten States have ratified or acceded to the Convention: Burundi, Chile, Georgia, Lebanon, Malawi, Mexico, Morocco, Rwanda, Senegal and Zambia. See http://untreaty.un.org/.

14 See chapters II and III.

15 "Multimodal transport contract" has been defined in article 1 (3) to mean "a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport."

16 Article 1 (2) defines "MTO" as "any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract."

17 Article 16 (1).

22. The Convention adopts a uniform system of liability of the MTO for both localized and non-localized damage (article 16 (1)), except that in cases of localized damage the limits of liability are to be determined by reference to the applicable international convention or mandatory national law which provide a higher limit of liability than that of the Convention (article 19). This approach, which is not entirely the "uniform", is known as the "modified network" system.

23. The period of responsibility of the MTO includes the entire period during which he is in charge of the goods, that is from the time he takes the goods in his charge to the time of the delivery (article 14). The MTO is also liable for the acts and omissions of his servant or agent or any other person of whose services he makes use for the performance of the contract (article 15).

24. The MTO's liability for loss of, or damage to, goods is to be limited to an amount not exceeding 920 units of account per package or other shipping unit, or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. If, however, the multimodal transport does not, according to the contract, include carriage by sea or by inland waterway, the limitation amount is raised to a higher level of 8.33 units of account (identical to that of the CMR) per kilogram of gross weight of the goods lost or damaged, without alternative package limitation (article 18 (1) and (3)). The limitation of liability of the MTO for loss resulting from delay in delivery is calculated by reference to the rate of freight, that is an amount equivalent to two and a half times the freight payable for the goods delayed, but without exceeding the total freight payable under the multimodal transport contract (article 18 (4)). The MTO, however, is not entitled to limit his liability if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the MTO done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result (article 21).

25. The Convention provides for a period of two years within which legal proceedings relating to international multimodal transport have to be instituted in order to prevent the claim from being time-barred. A recourse action by the MTO for indemnity against sub-contractors, however, is possible even after the expiry of limitation period, provided that it is permitted under the law of the State where proceedings are instituted and that it is not contrary to the provisions of another applicable international convention (article 25).

26. The Convention includes extensive provisions on documentation covering negotiable and non-negotiable multimodal transport documents, their contents, reservations and evidentiary effect (articles 5 to 10).

27. Concerning jurisdiction, the Convention gives a wide option to the claimant to institute an action for claims relating to international multimodal transport. It clearly provides that the plaintiff may sue in one of the following places:

(a) The principal place of business or residence of the defendant;

(b) The place where the MT contract was made;

(c) The place of taking the goods in charge or the place of delivery; or

(d) Any other place agreed upon and evidenced in the MT document (Article 26).

28. Following the growing trend in international commercial disputes, the Convention also recognizes arbitration as an alternative to judicial proceedings. It provides that the parties may agree, in writing, to submit their disputes under the Convention to arbitration. As to the place of arbitration, the options available to the claimant for jurisdiction are also available in case of arbitration (article 27).

**(ii) UNCTAD/ICC Rules for Multimodal Transport Documents**

29. Pending the entry into force of the UN Convention on International Transport of Goods 1980, the UNCTAD's Committee on Shipping, by resolution 60 (XII) of November 1986, instructed the secretariat to elaborate model provisions for multimodal transport documents, in close collaboration with the competent commercial parties and international bodies, based on the Hague and Hague/Visby Rules as well as existing documents such as the FBL (FIATA Bill of Lading) of the International Federation of Freight Forwarders Association (FIATA) and the ICC Uniform Rules for a Combined Transport Document. Following this resolution a joint UNCTAD/ICC working group was created to elaborate a new set of rules for multimodal transport documents. During a series of meetings the joint UNCTAD/ICC working group completed the preparation of the UNCTAD/ICC Rules for Multimodal Transport Documents in 1991. The Rules entered into force on 1 January 1992.[18]

30. The UNCTAD/ICC Rules for Multimodal Transport Documents have been incorporated in widely used multimodal transport documents such as the FIATA FBL 1992[19]and the "MULTIDOC 95" of the Baltic and International Maritime Council (BIMCO).[20] The main features of the UNCTAD/ICC Rules are the following:

31. The Rules do not have the force of the law but are of purely contractual nature and apply only if they are incorporated into a contract of carriage, without any formal requirement for "writing" and irrespective of whether it is a contract for unimodal or multimodal transport involving one or several modes of transport, or whether or not a document has been issued

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18 The text of the Rules can be found in ICC publication No. 481. They replaced the previous ICC Rules for a Combined Transport Document, 1973 (modified 1975) which were based on the "Tokyo Rules" and the "TCM" draft.

19 See FBL Negotiable FIATA Multimodal Transport Bill of Lading, issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents. The first FIATA FBL, called the FIATA Uniform Bill of Lading, was introduced in 1971 and was based on the Tokyo Rules developed by the CMI. A revised FIATA FBL was issued after the ICC introduced its Uniform Rules for a Combined Transport Document in 1975. See Ohl K., Development of the FIATA Multimodal Transport Bill of Lading based on the UNCTAD/ICC Rules for Multimodal Transport Documents, ICC seminar on the UNCTAD/ICC Rules for Multimodal Transport Documents, London, 28 January 1994. For a detailed study of the 1992 FIATA Multimodal Transport Bill of Lading, see Ramberg J., *The Law of Freight Forwarding and the 1992 FIATA Multimodal Bill of Lading*, FIATA Publication, 1993.

20 See the Negotiable Multimodal Transport Bill of Lading issued by the BIMCO subject to UNCTAD/ICC Rules for Multimodal Transport Documents. The BIMCO's previous Multimodal Transport Document known as the "COMBIDOC" was based on the previous ICC Rules for a Combined Transport Document 1975.

(Rule 1). Once they are incorporated into a contract, they override any conflicting contractual provisions, except in so far as they increase the responsibility or obligations of the multimodal transport operator. The Rules, however, can only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract (article 13).

32. Similar to the MT Convention, the liability of the MTO under the Rules is based on the principle of presumed fault or neglect. That is to say that the MTO is liable for loss of, or damage to, the goods and for delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge, unless he can prove that no fault or neglect of his own, his servants or agents or any other person of whose services he made use of for the performance of the contract, caused or contributed to the loss or delay in delivery (Rule 5.1). Although the basis of liability of the MTO under the Rules is similar to that under the MT Convention, there are significant differences between them. Firstly, unlike the MT Convention, under Rule 5.1, the MTO is not liable for loss following delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO. Secondly, if the multimodal transport involves carriage by sea or inland waterways, the MTO will not be liable for "loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

- act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

- fire, unless caused by the actual fault or privity of the carrier" (Rule 5.4).

33. These defences, however, are made subject to an overriding requirement that whenever loss or damage resulted from unseaworthiness of the vessel, the MTO must prove that due diligence was exercised to make the ship seaworthy at the beginning of the voyage (Rule 5.4). The provisions of the Rule 5.4 are intended to make the liability of the MTO compatible with the Hague/Visby Rules for carriage by sea or inland waterways.

34. Similar to the MT Convention, the period of responsibility of the MTO includes the period from the time he takes the goods in his charge until the time of their delivery.[21] Furthermore the MTO is also liable for the acts and omissions of his servants, agents or any other person of whose services he makes use for the performance of the contract (Rule 4.2).

35. The limitation amounts established by the Rules for loss of, or damage to, goods are clearly lower than those of the MT Convention. They are based on the limits set by the SDR protocol of 1979 amending the limits of the Hague/Visby Rules. Thus, according to Rule 6.1, unless the nature and value of the goods have been declared by the consignor and inserted in the MT document, the MTO shall not be liable for any loss of, or damage to, the goods in an amount exceeding the equivalent of 666.67 SDR (Special Drawing Rights) per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher. In the same way as the MT Convention, a higher limit is provided for cases where the multimodal transport does not, according to the contract, include carriage by sea or inland

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21 Rule 4.1. As to the definition of "delivery" see Rule 2.8.

navigation. In such a case the liability of the MTO is limited to an amount not exceeding 8.33 SDR per kilogram of gross weight of the goods lost or damaged (Rule 6.3), without any reference to package limitation which is more appropriate for sea transport.

36. Similar to the MT Convention, specific provisions on limitation of liability of the MTO are made for cases of localized damage. Under Rule 6.4, when the loss or damage occurs during one stage of transport, in respect of which an applicable international convention or mandatory national law would have provided another limit (and not a higher limit as provided by the MT Convention) of liability if a separate contract had been made for that particular stage of transport, then the limit of liability of the MTO for such loss or damage should be determined by reference to the provisions of such convention or mandatory national law.

37. The liability of the MTO for delay in delivery of the goods or consequential loss or damage is limited to an amount not exceeding the equivalent of the freight under the multi-modal transport contract (Rule 6.5). Finally, the MTO is not entitled to limit his liability if it is proved that the loss, damage or delay resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result (Rule 7).

38. Rule 10 sets the period of time-bar at 9 months. Thus, the MTO will be relieved from liability unless the suit is brought within 9 months after delivery of the cargo, or of the date when the cargo should have been delivered. This is to allow the MTO possibility of instituting recourse action against the performing carrier, as most unimodal conventions such as the Hague/Visby Rules set the time-bar period at 1 year. The MT Convention provides for a period of two years.

39. The Rules envisage the possibility of issuing both "negotiable" and "non-negotiable" multimodal transport documents, including evidentiary effect of information contained in the document (Rules 2.6 and 3). However, the Rules, being of purely contractual nature, it is doubtful whether their incorporation into MT documents would have the effect of creating a negotiable document in all jurisdictions.[22] Rule 3, concerning evidentiary effect of the information contained in the multimodal transport document, provides that such information shall be *prima facie* evidence of the taking in charge by the MTO of the goods as described in the document unless contrary indications, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, have been included in the printed text or superimposed on the document. This would mean that such pre-printed clauses would destroy the evidentiary value of the document which is clearly undesirable. The Rule further

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[22] In a majority of countries a document of title can only be created by custom, the law merchant or statute, but not through the agreement of the parties. This seems to be the case in German law, where a system of so-called Typenzwang -numerus clausus- excludes from the status of negotiable transport document any document not enumerated in the relevant commercial code and, from the status of document of title any document not expressly recognized as such by statute. Some continental law countries do, however, permit the parties to create negotiable documents of title by agreement through an "open system of negotiable documents of title." De Wit R., Multimodal Transport, 318; Recalde Castells A., *El Conocimiento de Embarque y otros Documentos del Transporte, editorial Civitas*, 1992, 346-348; See for a different view as to the creation of new documents of title Bools M., *The Bill of Lading: A Document of Title to Goods-An Anglo-American Comparison*, Lloyd's of London Press, 1997, 184-186. See as well Tantin G., Les Documents de Transport Combiné, *European Transport Law*, Vol. XV No. 4, 1980, 382-383.

provides that proof to the contrary shall not be admissible when the MT document has been transferred to the consignee, who in good faith has relied and acted on such information.

40. Unlike the MT Convention, the Rules do not include any provisions dealing with jurisdiction and arbitration. Multimodal transport documents currently used in practice usually provide for any dispute to be determined by the courts in accordance with the law at the place where the MTO has his principal place of business.[23]

## E. Related activities of other organizations

41. The lack of a uniform liability regime governing maritime and multimodal transport operations and the proliferation of diverse national approaches, prompted a number of organizations to initiate investigations into the subject with the aim of establishing possible solution.

42. Following mandates from the UN/ECE Inland Transport Committee and the Working Party on Combined Transport (WP. 24) to consider the possibilities for reconciliation and harmonization of civil liability regimes governing combined transport, the UN/ECE secretariat convened two informal ad hoc expert group meetings,[24] to hear the views of the industry including the relevant international organizations.[25] The subject was considered by the UN/ECE Working Party on Combined Transport at its thirty-fourth and thirty-fifth sessions held in September 2000 and April 2001 respectively. It was also discussed by the UN/ECE Inland Transport Committee in February 2001, and the Committee, having endorsed the work carried out so far by the ad hoc expert group, requested the group to pursue the complex task towards a harmonized civil liability regime covering multimodal transport operations.[26]

43. The Commission of the European Communities has identified the current intermodal arrangements in its communication on "Intermodality and Intermodal Freight Transport in the European Union"[27] as "an area of friction costs." Modally oriented cargo liability arrangements, which do not provide the shippers with a transparent and uniform liability regime, are considered to result in uncertainty and higher costs due to claims handling and litigation. With a view to making an inventory of the present liability arrangements and to identify possible approaches to solve the current deadlock, the Commission has sponsored a study on "intermodal transportation and carrier liability" (June 1999), which examines the problems associated with lack of coherent liability regime, including possible future regulatory options. It is understood that, as a follow-up, the Commission has launched an investigation into the economic impact of intermodal liability arrangements, the results of which could help in defining a possible new approach.

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23 See "MULTIDOC" 95, article 5, and FIATA FBL 92, article 19.

24 12-13 July 1999, and 24-25 January 2000.

25 See TRANS/WP.24/2000/3.

26 See ECE/TRANS/136.

27 Com (97) 243.

44. The Organization for Economic Co-operation and Development's (OECD) Maritime Transport Committee has considered the need for investigation into the existing cargo liability regimes with a view to finding a workable solution. The objective of the OECD project was to identify those elements of the existing cargo liability regimes governing maritime transport for which there is no general agreement, and attempt to find workable formulations that will allow them to be broadly acceptable to all parties. It was envisaged that such possible compromise formulations could form the basis of a widely acceptable set of common rules for further international consideration in an appropriate forum.[28] A workshop on cargo liability, organized by the OECD's Maritime Transport committee (MTC)[29], considered the issues identified in a report prepared by a consultant at the initiative of the MTC, in order to establish whether there might be some common ground or convergence that may provide some guidance to a future diplomatic conference. The report of the workshop is "offered to interested parties, be they governments, industry or international organizations that may in the future consider hosting or participating in diplomatic conferences to review cargo liability, as representing the end result of deliberations between these parties." Thus, while the outcome is not binding on any party, it is nevertheless intended to "offer some guidance as to the policy outcome that may be necessary to maximise the formulation of a more comprehensive, and generally acceptable form of cargo liability regime."[30]

45. In the context of the work of the United Nation's Commission on International Trade Law (UNCITRAL) on electronic commerce, it was pointed out by some delegations that fragmented and disparate national laws and legislation regarding certain aspects of transport law other than issues of liability, as well as significant gaps left by national laws and international conventions regarding issues such as the functioning of bills of lading and sea waybills, did not facilitate transition of trade practices to electronic alternatives. The UNCITRAL Commission, at its twenty-ninth session, in 1996, therefore, requested the secretariat to be the focal point for gathering information, ideas and opinions as to problems in transport law that arose in practice and possible solutions to those problems. Upon a request from the UNCITRAL secretariat, the CMI began investigation of the subject. Following a report on the progress of work within the CMI to the UNCITRAL Commission at its thirty-third session in June 2000, the Commission requested the UNCITRAL secretariat to continue cooperating with the CMI in order to present a report at its next session, identifying possible future work in the area of transport law.[31] In the meantime, the CMI had been preparing a draft text of an outline instrument on transport law issues covering various aspects of transport law including liability for loss of, or damage to, cargo. The core principles and issues involved were discussed at the 37th CMI Conference,[32] following which

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28 See DSTI/DOT/MTC (99) 19, October 1999.

29 In January 25-26, 2001 in Paris.

30 See the report of the Workshop on Cargo Liability Regimes: http://www.oecd.org/dsti/sti/transpor/sea/index.htm

31 See the report of the Commission at its thirty-third Session, 2 June-7 July 2000, General Assembly Official Records, fifty-fifth session, Supplement No. 17 (A/55/17).

32 Held in Singapore in February 2001.

the Outline Instrument is to be redrafted. It is proposed to extend the period of responsibility of the carrier to cover inland carriage preceding or subsequent to sea carriage during which he is in charge of the goods. The outcome of the work is to be submitted to UNCITRAL.

46. The ICC ad hoc Working Group on Multimodal Transport Law and Practice, having reviewed the status of multimodal transport liability regimes, concluded that the revision of the MT Convention was not a feasible option and that the harmonization of liability rules could be achieved through the incorporation of self-regulatory provisions into private contract. It therefore recommended further promotion of the UNCTAD/ICC Rules for Multimodal Transport Documents.

## Chapter II

## REGIONAL/SUBREGIONAL LAWS AND REGULATIONS

### A. Andean Community

### Decision 331 of 4 March 1993 as Modified by Decision 393 of 9 July 1996: "International Multimodal Transport"

47. In an effort to harmonize the multimodal transport rules and regulations within the subregion, the Andean Community enacted, in 1993, Decision 331which was substantially modified later in 1996 by Decision 393. Resolution 425 of 20 August 1996, concerning the registration scheme for multimodal transport operators, was also adopted. The Resolution contains provisions dealing with the requirements which should be fulfilled in order to operate as an MTO.

48. The member States of the Andean Community in which these laws and regulations apply are Bolivia, Colombia, Ecuador, Peru and Venezuela.

49. **Scope of application:** The law applies to all contracts of international multimodal transport if the place of taking in charge or delivery of the goods by the MTO as provided for in the MT contract is located in a member State.

50. Provisions are also included for regulation of MTOs, which apply not only to all MTOs operating between member States, but also to MTOs operating to or from a member State.[33] In other words, MTOs operating from a third country to a member State are also subject to these laws and regulations.

51. **Definitions:** The list of definitions include those of the terms international multimodal transport, MT contract, MTO, MT document, consignee, consignor, goods, carrier and taken in charge. They are mainly derived from those of the MT Convention and the UNCTAD/ICC Rules.[34]

52. **Documentation:** Provisions are made concerning the issuance of negotiable or non-negotiable documents at the option of the consignor, their content (based on the MT Convention) and evidentiary value.[35] Article 5 of Decision 331, following the approach of the UNCTAD/ICC Rules, concerning the evidentiary effect of the information contained in the MT document, provides that such informations shall be *prima facie* evidence of the taking in charge by the MTO of the goods as described in the document, unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container", or similar expressions, has been made in the printed text or superimposed on the document. Proof to

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[33] Articles 3 and 4 of Decision 393 modifying article 2 of Decision 331. For conditions to operate as MTO, see articles 9, 10, 11, 12 and 13 of Decision 393 modifying chapter IV of Decision 331. See also Resolution No. 425.

[34] See article 2 of Decision 393 modifying article 1 of Decision 331.

[35] Article 3 of Decision 331.

the contrary is not admissible when the MT document has been transferred, or the equivalent EDI (Electronic Data Interchange) message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon.

**Liability of the MTO**

53. The provisions of Decision 331 dealing with the MTO's liability for loss of, or damage to, the goods were the main areas which were subject to significant modification by Decision 393.

54. **Period of responsibility:** The liability of the MTO extends to the period during which the goods are in his charge until the time of their delivery.[36]

55. **Basis of liability:** Similar to article 16 (1) of the MT Convention, article 5 of Decision 393 makes the MTO liable for loss, damage or delay in delivery of the goods, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless he can prove that he, his servants, agents or any other persons he made use for the performance of the contract, took all measures that could reasonably be required to avoid the occurrence and its consequences.[37] Notwithstanding this provision, however, the MTO is not liable if he proves that the loss, damage or delay in delivery was caused by one or more of the following:

- act or neglect of the consignor, the consignee or their representatives or agents;
- insufficiency or defective packing of the goods, their marks or numbers;
- handling, loading, unloading and stowage of the goods effected by the consignor, the consignee or their agents;
- inherent vice or defect in the goods;
- strike, lock-out, stoppage or restraint of labour beyond the control of the MTO.[38]

56. Provisions of articles 5 and 6 apply in determining the basis of liability of the MTO in cases of both localized and non-localized damage, as article 7 only makes the limits of liability of the MOT in case of localized damage subject to the provisions of the relevant applicable international convention or mandatory law.

57. **Localized damage:** Article 7 of Decision 393[39] reproduces article 19 of the MT

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36 Article 6 of Decision 331.

37 Article 5 of Decision 393, replacing article 9 of Decision 331.

38 Article 6 of Decision 393 modifying article 11 of Decision 331, which had reproduced rule 5.4 of the UNCTAD/ICC Rules on "defences of carriage by sea or inland waterways."

39 Which replaces article 16 of Decision 331.

Convention concerning localized damage. Thus adopting a modified network system of liability, it provides that when the loss of, or damage to, the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory law provides a higher limit of liability than the one provided in the present law, then the limit of liability of the MTO shall be determined by reference to the provisions of such convention or mandatory national law.[40]

58. **Delay in delivery:** The MTO is not liable for loss resulting from delay in delivery unless the consignor has made a declaration of interest in delivery within an agreed period of time which has been accepted by the MTO.[41] According to article 10 of Decision 331, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. If the goods are not delivered within 90 consecutive days following the agreed date or the reasonable time expected of a diligent MTO, the claimant may, in the absence of evidence to the contrary, treat the goods as lost.[42]

59. **Liability for servants and agents:** The MTO is also responsible for acts and omissions of his servants or agents, when acting within the scope of their employment, or of any person of whose services he makes use for the performance of the contract, as if such acts or omissions were of his own.[43]

60. **Limitation of liability:** Provisions dealing with the MTO's limits of liability follow those of the UNCTAD/ICC Rules. Thus, unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the MT document, the MTO shall not be liable for any loss of, or damage to, the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher.[44] If, however, the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO is limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.[45]

61. If the MTO is liable in respect of loss resulting from delay in delivery, or consequential loss or damage other than loss of, or damage to, the goods, the liability of the

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40 Article 16 of Decision 331 had adopted the network liability system.

41 Article 5 of Decision 393, replacing article 9 of Decision 331.

42 This approach is based on that adopted by Rule 5.3 of the UNCTAD/ICC Rules. It differs from article 16 of the MT Convention in so far as conversion into final loss only takes place in the absence of proof that the goods have been lost.

43 Article 7 of Decision 331.

44 Article 13 of Decision 331.

45 Article 15 of Decision 331.

MTO is limited to an amount not exceeding the equivalent of freight under the MT contract for the multimodal transport.[46]

62. Provisions dealing with the loss of right to limit liability are based on the relevant provisions of the MT Convention and of the UNCTAD/ICC Rules.[47]

63. **Assessment of compensation:** Article 12 of Decision 331 follows Rule 5.5 of the UNCTAD/ICC Rules in providing for the compensation for loss of, or damage to, the goods to be assessed by reference to the value of the goods at the place and time of their delivery to the consignee, or at the place and the time when they should have been delivered in accordance with the MT contract. The value of the goods is to be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

64. **Liability of the consignor:** Article 20 of Decision 331, dealing with duties and liabilities of the consignor, is based on the relevant provisions of the MT Convention[48] and the UNCTAD/ICC Rules[49] which are identical in this respect.

65. **Time-bar:** According to article 22 of Decision 331, unless otherwise expressly agreed, the MTO is discharged from all liability unless judicial or arbitral proceedings are instituted within 9 months after the delivery of the goods, or the date when they should have been delivered, or the date when the consignee would have been entitled to treat them as lost.[50]

66. **Jurisdiction:** Article 24 of Decision 331, following the approach of the MT Convention, permits the plaintiff, at his option to institute an action in a competent court within the jurisdiction of which is situated one of the following places:

- the principal place of business of the MTO;
- the place where the MT contract was made;
- the place of taking the goods in charge;
- the place of delivery of the goods; or

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46 Article 17 of Decision 331.

47 Article 19 of Decision 331. See also 21 (1) of the MT Convention, and Rule 7 of the UNCTAD/ICC Rules.

48 Article 12.

49 Rule 8.

50 See also Rule 10 of the UNCTAD/ICC Rules.

- any other place designated for that purpose in the MT contract and evidenced in the MT document.

67. **Arbitration:** Article 25 of Decision 331 allows the parties to agree, in writing, to submit any dispute arising from the MT contract to arbitration. As regards the place of arbitration, the same options as with the case of court jurisdiction are also available to the claimant for instituting arbitration proceedings.

68. **Supplementary provisions:** According to article 26 of Decision 331 any stipulation in the MT document derogating directly or indirectly for the provisions of chapter III[51] shall be null and void, particularly if it is prejudicial to the rights of the consignor or the consignee.

69. Article 27 of Decision 331, however, provides that unless otherwise agreed, the provisions of international conventions applicable to the MT contract shall prevail over the provisions of this Decision, provided that all member countries are parties to the said convention. This is without prejudice to the provisions of article 16, providing for the limitation of the MTO's liability in case of localized damage to be determined by reference to the provisions of the applicable international convention.

## B. MERCOSUR[52]

### Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995

70. The Agreement aims at facilitating the multimodal transport within member States. The member States of MERCOSUR in which the Agreement is to apply are Argentina, Brazil,[53] Paraguay[54] and Uruguay[55].

71. **Scope of application:** The Agreement applies to contracts for multimodal transport of goods, provided that the place of taking in charge of the goods by the MTO or the place of their delivery is located in a member State.[56] The provisions of this Agreement, however, will only apply if specific reference to the Agreement is made in the MT contract.[57]

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51 Chapter III covers substantive provisions of the legislation including provisions dealing with MT document, liability of the MTO and of the consignor, limitation of liability, jurisdiction, arbitration, etc.

52 Mercado Común del Sur.

53 Decree No. 1563 of 19 July 1995 implements the Agreement in Brazil.

54 Decree No. 16.927 of 16 April 1997 implements the Agreement in Paraguay.

55 Although the Decree No. 99/95 of 8 August 1995 implemented the Agreement in Uruguay, a court of law (Tribunal Contencioso Administrativo) in Uruguay suspended the application of the Decree as of 9 November 1998.

56 Article 2.

57 Article 4.

Furthermore, it seems that only duly registered MTOs can invoke the application of the Agreement.[58]

72. **Definitions:** The definition of MT contract to which the Agreement is to apply is based on that of the MT Convention. Other definitions include those of MTO, multimodal transport, MT document, consignee, consignor, taking in charge, delivery and carrier.[59]

**Liability of the MTO**

73. **Period of responsibility:** The MTO is responsible for loss of, or damage to, goods from the time he takes the goods in his charge to the time of their delivery (article 6).

74. **Basis of liability:** According to article 9, the MTO is liable for loss, damage or delay in delivery of the goods, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge. The MTO could, however, be exempted from liability if he proves that the loss, damage or delay was caused by one or more of the following circumstances:

- act or default of the consignor or consignee or their agents/representatives;
- inherent vice or latent defect of the goods;
- *force majeure* and fortuitous event;
- strike, riot and lock-outs;
- any other cause beyond the control of the MTO that prevents the fulfilment of the contract of carriage.[60]

75. **Localized damage:** Article 15 adopts a modified network system of liability to the extent that in case of localized damage, only the limitation of the MTO's liability, and not the basis of liability, will be determined in accordance with the provisions of the applicable international convention or mandatory national law governing the stage of transport during which the loss or damage took place. Thus, the basis of liability of the MTO in case of localized damage is determined, under the provisions of article 9, subject to the exceptions provided in article 10.

76. Furthermore, in case of localized damage, the performing carrier will be jointly liable with the MTO for loss, damage or delay in delivery of the goods to the consignee (article 19).

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[58] See article 4 and chapter VIII, which include provisions dealing with registration of the MTO in member States.

[59] See article 1.

[60] See article 10. The second sentence of article 10 goes on to provide that the MTO and all persons, whether physical or legal, that intervene, at the request of the MTO, in the movement of cargo, will be responsible for the increase in loss, damage or delay in delivery arising from their activity, irrespective of whether or not they admit responsibility.

77. **Delay in delivery:** The MTO assumes liability for delay in delivery of the goods, if the consignor has made a declaration of interest in timely delivery of the goods which has been accepted by the MTO (article 9).

78. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of the agreement, within the time which it would be reasonable to require of a MTO, having regards to the circumstances of the case. If the goods are not delivered within 90 days following the agreed date or expected reasonable time, the claimant may treat the goods as lost (article 11).

79. **Liability for servants and agents:** The MTO is responsible for acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were of his own (article 7).

80. **Limitation of liability:** The Agreement does not establish a uniform limit of liability of the MTO.[61] Thus, unless the nature and value of the goods have been declared by the consignor and inserted in the MT document, the MTO shall in no event be liable for loss of, or damage to, the goods in an amount exceeding the following:

- **Argentina:** 400 Argentine gold pesos per package, or 10 Argentine gold pesos per kilogram, whichever is the higher.

- **Brazil, Paraguay and Uruguay:** 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

81. The liability of the MTO in respect of loss following from delay in delivery or consequential loss or damage is limited to an amount not exceeding the equivalent of freight under the MT contract (article 16).

82. The MTO, however, will lose the right to limit liability if it is proved that the loss, damage or delay resulted from his personal act or omission done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss, damage or delay would probably result (article 18).

83. **Assessment of compensation:** Provisions dealing with the assessment of compensation for loss of, or damage to, goods (article 12) are based on Rule 5.5 of the UNCTAD/ICC Rules.

84. **Liability of the consignor:** Provisions of article 20 dealing with liability of the consignor are derived from those of the UNCTAD/ICC Rules and the MT Convention, which are identical in this respect.[62]

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61 See article 13 and annex 1 to the Agreement.

62 See Rule 8 of the UNCTAD/ICC Rules and article 12 of the MT Convention.

85. **Time-bar:** A period of one year has been provided for instituting any action relating to multimodal transport (article 22).

86. **Jurisdiction:** According to article 1 of annex II, the plaintiff, at his option, may institute judicial proceedings in a court in the following places:

- the principal place of business of the defendant;
- the place of delivery of the goods; or
- the place where the goods should have been delivered.

87. **Arbitration:** Article 2 of annex II permits the parties to agree, in writing, to submit any dispute arising from multimodal transport to arbitration. As to the place of arbitration, the same options as with court of jurisdiction are available to the parties.

88. **Supplementary provisions:** Article 32 renders any stipulation in a MT document derogating, directly or indirectly, from the provisions of this Agreement null and void, particularly if it prejudices the rights of the consignor or the consignee.

## C. ALADI[63]

### Agreement on International Multimodal Transport, 1996

89. The Third Ordinary Meeting of Ministers of Transport, Public Works and Communication of South America approved the above Agreement, in November 1996, by Resolution 23 (III). The member States of ALADI in which the Agreement is to apply are Argentina, Bolivia, Brazil, Colombia, Chili, Ecuador, Paraguay, Peru, Uruguay and Venezuela. The Agreement requires notification by six signatory States of their readiness to be bound by it in order to enter into force (article 46). So far, three States have subscribed to the Agreement: Bolivia, Peru and Venezuela.

90. **Scope of application:** The Agreement applies to contracts of international multimodal transport whenever the place of taking in charge or delivery of the goods by the MTO, as provided for in the MT contract, is located in a country signatory to the Agreement.[64] The provisions of the Agreement, however, shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions applicable to the multimodal transport or unimodal transport contract (article 3).

91. **Definitions:** The list of definitions include those of MTO, MT contract, MT document, international multimodal transport, consignor, consignee, carrier, addressee, goods, writing, taking in charge, delivery, SDR and mandatory law (article 1), which are mainly derived from the provisions of the MT Convention and of the UNCTAD/ICC Rules.

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63 Asociacion Latinoamericana de Integracion (ALADI).

64 Article 2.

92. **Documentation:** Provisions are made concerning the issuance of a negotiable or non-negotiable MT document, at the option of the consignor (article 3), reservations as well as evidentiary effect of such documents (article 5).

**Liability of the MTO**

93 **Period of responsibility:** The MTO is responsible for loss of, or damage to, goods from the time he takes the goods in his charge until the time of their delivery (article 6).

94. **Basis of liability:** According to article 9 of the Agreement the MTO is liable for loss of, or damage to, the goods as well as for delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless the MTO proves that he, his servants, agents or any other person of whose services he made use for the performance of the contract took all the measures that could reasonably be required to avoid the occurrence and its consequences, and that there was no fault or reckless behaviour that contributed to the loss, damage or delay in delivery.

95. Article 10, however, exempts the MTO from liability if he proves that the loss, damage or delay in delivery was caused by one or more of the following:

- act or neglect of the consignor, consignee or their agents/representatives;
- insufficiency or defective packaging of the goods, their marks or number;
- handling, loading, unloading and stowage of the goods effected by the consignor/consignee or their agents;
- inherent vice or defect of the goods;
- strike, lock-out, stoppage or restraint of labour beyond the control of the MTO.[65]

96. **Localized damage:** According to article 15, only the limits of liability, and not the basis of liability, of the MTO in case of localized damage is to be determined by reference to the provisions of the applicable international convention or mandatory national law governing the particular stage of multimodal transport during which the loss or damage occurred (modified network system). Thus, the provisions of articles 9 and 10 dealing with the basis of liability of the MTO will also apply in case of localized damage.

97. **Delay in delivery:** Following the approach of the UNCTAD/ICC Rules, the MTO will only assume liability arising from delay in delivery of the goods if there is a declaration of interest by the consignor in timely delivery which has been accepted by the MTO (article 9). Similarly provisions dealing with establishing the occurrence of delay and conversion of delay into final loss follow Rules 5, 2 and 5, 3 of the UNCTAD/ICC Rules (articles 23 and 24).

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[65] See also the Andean Community legislations, articles 5 and 6 of Decisions 393 replacing articles 9 and 11 of Decision 331, which adopt the same approach.

98. **Liability of MTO for his servants and agents:** According to article 7, the MTO is liable for the acts and omissions of his servants and agents, when acting within the scope of their employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own.

99. **Limitation of liability:** Provisions dealing with limitation of liability of the MTO are based on Rules 6.1 and 6.3 of the UNCTAD/ICC Rules. Thus, unless the nature and value of the goods have been declared by the consignor, the MTO shall not be liable for any loss of, or damage to, the goods in an amount exceeding 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher (article 12). The limit of 8.33 SDR per kilogram has been provided if, according to the MT contract, the multimodal transport does not include carriage by sea or inland transport (article 14).

100. The liability for loss resulting from delay and consequential loss is limited to an amount not exceeding the equivalent of the freight under the MT contract.[66] Provisions dealing with the loss of right to limit liability follow those of the MT Convention and the UNCTAD/ICC Rules (article 18).

101. **Assessment of compensation:** Article 11, dealing with the assessment of compensation for loss of, or damage to, the goods, reproduces Rule 5.5 of the UNCTAD/ICC Rules.

102. **Liability of the consignor:** Articles 19 to 22, in determining the duties and liabilities of the consignor, follow the relevant provisions of the MT Convention and UNCTAD/ICC Rules.

103. **Time-bar:** A period of 9 months is allowed for instituting any judicial or arbitral proceeding against the MTO. The prescription period commences from the time of delivery of the goods, or the date when they should have been delivered, or the date when the consignee would have been entitled to treat them as lost (article 30).

104. **Jurisdiction:** Article 28 permits the plaintiff, at his option, to institute an action in a competent court within the jurisdiction of which is situated one of the following places:

- the principal place of business of the MTO;
- the place where the MT contract was made;
- the place of taking the goods in charge for multimodal transport; or
- the place of delivery of the goods.[67]

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66 Article 16. See also Rule 6.5 of the UNCTAD/ICC Rules.

67 Unlike article 26 of the MT Convention, article 26 of the Agreement does not recognize jurisdiction of any other place designated in the MT contract and evidenced in the MT document.

105. **Arbitration:** Article 29 allows the parties to submit their dispute to arbitration. The choice of the places available to the parties are the same as those of jurisdiction under article 28.

### D. Draft ASEAN Framework Agreement on Multimodal Transport[68]

106. In the preamble of the draft Framework Agreement, the Members of the Association of South East Asian Nations recognize that international multimodal transport is a means of facilitating the expansion of international trade and the need to stimulate the development of efficient multimodal transport services, as well as the desirability of adopting certain rules relating to the carriage of goods under international multimodal transport contracts, including provisions concerning the liability of the multimodal transport operators.

107. The substantive provisions of the draft Framework Agreement are mainly derived from those of the MT Convention and of the UNCTAD/ICC Rules for Multimodal Transport Documents. The draft Framework Agreement also includes provisions concerning regulation of the MTOs, including registration of the MTOs with the competent national body within member countries and conditions required for such registration (chapter IX).

108. **Scope of application:** Article 2 of the draft provides for mandatory application of the Agreement to: (a) all MTOs under the register of each competent national body; and (b) all contracts of multimodal transport, if the place for the taking in charge or delivery of the goods are located in a member country.[69]

109. **Definitions:** The draft Agreement includes definitions of the terms international MT, MT contract, MT document and MTO, which are based on those of the MT Convention, as well as definitions of the terms carrier, consignor, consignee, taken in charge, delivery, SDR and goods, which are derived from the UNCTAD/ICC Rules.[70]

110. **Documentation:** Provisions dealing with the issuance of multimodal transport document, including both negotiable and non-negotiable form, and its content are derived from those of the MT Convention.[71] As to the evidentiary effect of the information contained in the document, the draft Agreement adopts the approach of the UNCTAD/ICC Rules to the effect that such information shall be *prima facie* evidence of the taking in charge by the MTO of the goods as described in the document unless contrary indications, such as "shipper's weight, load and count", "shipper-packed container" or a similar expression, have been made in the printed text or superimposed on the document.[72]

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68 Final draft, considered by the Third ASEAN Transport Facilitation Working Group Meeting, 19-20 March 2001, Bangkok, Thailand. The ASEAN members are: Brunei, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

69 See article 2 of the MT Convention.

70 See article 1.

71 See articles 4, 5 and 6.

72 See article 6 (1); see also Rule 3 of the UNCTAD/ICC Rules.

**Liability of the MTO**

111. **Period of responsibility:** Similar to the MT Convention and UNCTAD/ICC Rules, under the draft Agreement the period of responsibility of the MTO covers the period from the time he takes the goods in his charge to the time of their delivery (article 7).

112. **Basis of liability:** According to article 10 of the draft Agreement, the MTO is liable for loss resulting from loss of, or damage to, the goods as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge, unless he proves that he, his servants or agents, etc., took all measures that could reasonably be required to avoid the occurrence and its consequences. Article 12, however, includes provisions exempting the MTO from liability for loss, damage or delay in delivery if he proves that the event, which caused such loss, damage or delay is one or more of the following circumstances:

"a. *force majeure*;

b. act or neglect of the consignor, the consignee or his representative or agent;

c. insufficient or defective packaging, marking, or numbering of the goods;

d. handling, loading, unloading, stowage of the goods effected by the consignor, the consignee or his representative or agent;

e inherent or latent defect in the goods;

f. strike, lock-out, work stoppage, total or partial restraints on labour;

g. with respect to goods carried by sea, or inland waterways, when such loss, damage, or delay during such carriage has been caused by:

(i) act, neglect, or default of the master, mariner, pilot or the servant of the carrier in the navigation or in the management of the ship; or

(ii) fire unless caused by the actual or privity of the carrier.

However, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the multimodal transport operator can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage."

113. **Localized damage:** Provisions of articles 10 and 12 seem to apply in determining the liability of the MTO, both in cases of localized and non-localized damage (modified network system). According to article 17, in case of localized damage, only the limit of the MTO's liability is to be determined by reference to the provisions of the applicable international

convention or mandatory law, which provide another limit of liability (and not necessarily a higher one).

114. **Delay in delivery:** Similar to the UNCTAD/ICC Rules, the MTO will only be liable for loss following from delay in delivery if the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO (article 10 (2)). Provisions of article 11, dealing with determination of the occurrence of delay and right of the claimant to treat the goods as lost following 90 consecutive days from the date agreed for delivery, or the date they should have been delivered, are based on those of the UNCTAD/ICC Rules.

115. **Limitation of liability of the MTO:** Provisions dealing with the limitation of liability of the MTO are based on those of the UNCTAD/ICC Rules.[73] Thus, unless the nature and value of the goods have been declared by the consignor and inserted in the MT document, the MTO shall in no event be liable for any loss or damage to the goods in an amount exceeding the equivalent 666.67 SDR per package or unit, or 2.00 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher (article 14). The limits of liability of the MTO are increased to an amount not exceeding 8.33 SDR (same as the MT Convention and UNCTAD/ICC Rules) per kilogram of gross weight of the goods lost or damaged, if the multimodal transport does not, according to contract, include carriage by sea or inland waterways (article 16).

116. The MTO's liability for loss resulting from delay in delivery, or consequential loss or damage under article 18, is limited to an amount not exceeding the equivalent of the freight under the MT contract.[74]

117. The MTO, however, will lose the benefit of the limitation of liability if it is proved that the loss, damage or delay resulted from his personal act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.[75]

118. **Assessment of compensation:** Provisions are made, based on those of the UNCTAD/ICC Rules, for the assessment of compensation for loss of, or damage to, the goods by reference to the value of such goods at the time and place of delivery to the consignee or the time and place where they should have been delivered according to the MT contract. The value of the goods is to be determined according to the current commodity exchange price or, in the absence of such price, according to the current market price, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality (article 13).

119. **Liability of the consignor:** Provisions are made regarding the consignor's guarantee of the accuracy of the particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity, as well as his duty to indemnify the MTO against loss

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73 See chapter V, articles 14-20.

74 See also Rule 6.5 of UNCTAD/ICC Rules.

75 See article 20 of the draft Agreement. See also article 21 (1) of the MT Convention, and Rule 7 of the UNCTAD/ICC Rules.

resulting from any inaccuracies or inadequacies of such particular.[76] Specific provisions are also made regarding the shipment of dangerous goods based on those of the MT Convention.[77]

120. **Time-bar:** Similar to the UNCTAD/ICC Rules, a period of nine months has been fixed for instituting any action relating to multimodal transport. The period commences from the time of delivery of the goods, or if they have not been delivered, the date they should have been delivered or the date the consignee would have the right to treat the goods as lost (article 23).

121. **Jurisdiction and arbitration:** The draft Agreement reproduces the provisions of articles 26 and 27 of the MT Convention on the subject (articles 25 and 26).

122. **Contractual stipulations:** Any stipulation in the MT document departing, directly or indirectly, from the provisions of the Agreement, particularly those that are prejudicial to the consignor or the consignee, shall be null and void and produce no effect (article 27).

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76 See chapter VI, article 21 (1), (6), (7) and (8), which corresponds to article 12 of the MT Convention and Rule 8 of the UNCTAD/ICC Rules.

77 See article 21, paragraphs (2) to (5). See also article 23 of the MT Convention.

## Chapter III

## NATIONAL LAWS AND REGULATIONS

### A. ARGENTINA

### Law No. 24.921: Multimodal Transport of Goods, *Official Bulletin*, 12 January 1998

123. While Argentina is a State member of ALADI and MERCOSUR, it has also enacted the above specific legislation on multimodal transport.

124. **Scope of application:** According to article 1, the law applies to national multimodal transport. It also applies to international multimodal transport of goods, if the place of delivery of the goods, as provided for in the multimodal transport contract, is located in Argentina. Therefore, it has no application to multimodal transport of goods when the place of taking in charge of the goods, according to the MT contract, is located in Argentina.

125. **Definitions:** The list of definitions included in article 2 includes definitions of the terms "MTO" and "MT contract", based on the provisions of the MT Convention, as well as of international multimodal transport, carrier, cargo terminal, consignor, consignee, goods, taking in charge, delivery and unitization.

126. **Documentation:** Under article 3, the MTO is bound to issue the MT document no later than 24 hours after taking in charge of the goods. The MT document may be issued in negotiable or non-negotiable form (article 4).

127. The information contained in the MT document is to be *prima facie* evidence of the taking in charge by the MTO of the goods as described. Proof to the contrary is not admissible if the MT document has been transferred to a third party, including a consignee, acting in good faith in reliance on such information (article 8).

128. The MTO is required to insert reservations in the MT document if he knows, or has reasonable grounds to suspect, that the descriptions of the cargo on the document do not accurately represent the goods taken in charge (article 9).

129. Article 10 provides for the validity of letters of guarantee, as between the shippers and the MTO, for the issuance of a clean MT document and without inserting any reservations. Such letter of guarantee, however, is void and of no effect against any third party acting in good faith or when the particulars contained therein are contrary to the requirements of law.

#### Liability of the MTO

130. **Period of responsibility:** The MTO is liable for loss of, or damage to, goods from the time the goods are in his charge to the time of their delivery (article 15).

131. **Basis of liability:** According to article 21, the MTO is liable for loss, damage or delay in delivery of the goods and for any breach of the MT contract unless such loss, damage or delay is caused by the following:

- inherent vice or latent defect of the goods;
- insufficiency or defective packaging which is not apparent;
- fault of the shipper, consignee, owner of the cargo or their representatives;
- *force majeure* or act of God. The carrier must prove that he, or his representative, took all measures to avoid the damage;
- strikes, riots or lock-outs by third parties;
- order of public authorities that prevents the execution of the transport contract or results in delay in delivery of the goods, provided that it is not due to the fault of the MTO.

132. **Localized damage:** In cases of localized damage, where it is known that the loss, damage or delay occurred during a particular mode of transport for which there is specific legislation providing for a liability system and exclusions different from this law, then the exoneration of the MTO's liability will be determined in accordance with such legislation (article 19).

133. **Delay in delivery:** According to article 17, the MTO is only liable for delay in delivery if there is a declaration of interest by the consignor in timely delivery of the goods, which has been accepted by the MTO.[78]

134. Delay in delivery is considered to occur when the goods are not delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. If, however, the goods are not delivered within 90 consecutive days following the date of delivery the consignor or consignee may treat them as lost (article 18).[79]

135. **Liability for servants and agents:** The MTO is also responsible for the acts and omissions of his servants or agents, when acting within the scope of their employment, or of any other person of whose services he makes use for the performance of the contract (article 16).

136. **Limitation of liability:** According to article 24, if the loss, damage or delay in delivery takes place during the sea or air transport, the limitation of the MTO's liability will be determined by reference to the law governing such modes of transport. In case of non-

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78 See Rule 5.1 (last sentence) of the UNCTAD/ICC Rules.

79 See article 16 (2) and (3) of the MT Convention. See also article 11 of the MERCOSUR legislation.

localized damage or loss arising during the rail or road transport, the liability of the MTO will be limited to 400 Argentine gold pesos per package. The same limit of 400 gold pesos per freight unit will apply in case of cargo carried in bulk.

137. The MTO will lose the benefit of the limitation of liability if it is proved that the loss, damage or delay resulted from an act or omission of the MTO, or of any of his servants or agents, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result (article 28).

138. **Assessment of compensation:** Provisions dealing with the assessment of compensation for loss of, or damage to, the goods reflect those of Rule 5.5 of the UNCTAD/ICC Rules.[80]

139. **Liability of the consignor:** According to article 33 the consignor must indicate with accuracy, at the time the goods are taken in charge by the MTO, all particulars relating to the general nature of the goods, their marks, number, weight, volume and quality.[81]

140. **Jurisdiction and arbitration:** According to article 41, in cases of contracts for international multimodal transport in which the place of delivery of goods is located in Argentina, any provisions stipulating a different jurisdiction other than the competent Federal Tribunal of Argentina is null and void. However, the parties' agreement to submit the dispute to a foreign court or arbitration following the occurrence of the loss or damage is considered valid.

141. **Time-bar:** The period of time provided for instituting any action relating to multimodal transport is one year from the time of delivery of the goods or, if the goods have not been delivered, from the time they should have been delivered (article 43).

142. **Supplementary Provisions:** Articles 47 and 48 extend to the MT contract, the application of the provisions of the Argentine Navigation Law No. 20.094 concerning lien on cargo and freight. The law also introduces a licensing system for MTOs (articles 49 and 50) and a compulsory civil liability insurance scheme (article 51).

## B. AUSTRIA

143. According to the information received from the Government, there is no uniform law on multimodal transport in Austria. Specific provisions are contained in the Austrian Commercial Code, which apply to various modes of transport, such as road, rail and sea carriage.

144. In cases of localized damage, when the location of the loss or damage is known, the rules and regulations governing the particular stage of transport during which the loss or damage occurred apply. In cases of non-localized damage, when the location of loss or damage is unknown, the law most favourable to the claimant is applied.

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80 See articles 22 and 23.

81 See also article 12 (1) of the MT Convention.

## C. BRAZIL

### Law No. 9.61 of 19 February 1998 on Multimodal Transport of Goods

145. Brazil is a State member of ALADI and MERCOSUR. It has also enacted the above legislation on multimodal transport.

146. **Scope of application:** The law applies to national multimodal transport of goods. It also applies to international multimodal transport whenever the place of taking in charge or delivery of the goods is located in Brazilian territory (see articles 1 and 2).

147. **Definitions:** The only definitions provided are those of multimodal transport and of the MTO. Multimodal transport is described, in article 2, as the transport of goods from origin to destination under one contract by two or more modes of transport under the responsibility of the MTO. Article 5 defines the MTO as a legal person who acts as a principal and assumes responsibility for the performance of the MT contract.

148. **Documentation:** Provisions are made for the issuance of negotiable or non-negotiable MT document at the option of the consignor (article 10), and for the inclusion of reservations in the MT document by the MTO at the time of taking the goods in charge (article 9).

#### Liability of the MTO

149. **Period of responsibility:** The responsibility of the MTO for the goods covers the period from the time he takes the goods in his charge until the time of their delivery (article 13).

150. **Basis of liability:** The MTO and his subcontracts are liable for loss of or damage to the goods unless the loss or damage results from:

- act or fault of the consignor or consignee;
- insufficiency of packing resulting from the fault of the consignor;
- inherent vice or latent defect of the goods;
- handling, loading, unloading and stowage of the goods effected by the consignor or consignee or their agents;
- *force majeure* or fortuitous event.[82]

151. **Localized damage:** In cases of localized damage only the limitation of liability, not the basis of liability, of the MTO is to be determined in accordance with the provisions of the applicable international convention or mandatory law governing the particular stage of the

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82 Article 16; see also article 11.

multimodal transport during which the loss or damage occurred (modified network system).[83] Furthermore, in cases of localized damage, the performing carrier will be jointly liable with the MTO for the loss, damage or delay in delivery of the goods to the consignee (article 17 (5)).

152. **Delay in delivery:** According to article 11, the MTO only assumes liability for delay in delivery if there is an express agreement by the parties as to the time for delivery. Delay in delivery is considered to occur when the goods have not been delivered within the time expressly agreed upon or, in the absence of agreement, within the time which it would be reasonable to require of an MTO having regard to the circumstances of the case. If the goods are not delivered within 90 consecutive dates following the date agreed or the reasonable time to be expected from an MTO, the claimant may treat the goods as lost (article 14).

153. **Liability for servants and agents:** According to article 12, the MTO is liable for the acts and omissions of his servants or agents or of any other person of whose services he makes use for the performance of the MT contract, as if such acts and omissions were his own. Unlike the provisions of the MT Convention (article 15) and of the UNCTAD/ICC Rules (Rule 4.2), article 12 does not include a requirement for the servants or agents to be acting "within the scope of their of employment."

154. **Limitation of liability:** The liability of the MTO, under article 17, is limited to the declared value of the goods lost or damaged, including the cost of freight and insurance. If the consignor has not declared the value of the goods, the MTO can limit its liability to an amount not exceeding 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher.[84] The liability of the MTO in respect of loss following from delay, consequential loss or damage other than loss or damage to the goods, is limited to an amount not exceeding the value of the freight under the MT contract (article 17 (2)).

155. The MTO loses the right to limit liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the MTO done with intent to cause such loss or damage, or recklessly and with the knowledge that such loss, damage or delay would probably result (article 20).

156. **Time-bar:** A period of one year has been allowed for bringing any action relating to multimodal transport. The one year time-bar period commences from the time of delivery of the goods or, if the goods are not delivered, from the 90th day from the time they should have been delivered (article 22).

157. **Arbitration:** Provisions of article 23 permit the parties to submit their dispute to arbitration.

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83 See article 17 (4).

84 Article 32 (1). See also Rule 6.1 of the UNCTAD /ICC Rules.

158. **Supplementary provisions/regulations:**

- Decree No. 3.411 of 12 April 2000. Regulation to Law No. 9.611 of 19 February 1998, modifying Decree Nos. 91.030 of 5 March 1985 and 1.910 of 21 May 1996: The Decree regulates the licensing and registration of the MTO and certain taxation issues.

- Circular No. 40/SUSEP/MF of 29 May 1998 concerning compulsory insurance coverage for MTOs: The circular regulates the compulsory civil liability insurance scheme for MTOs operating within MERCOSUR countries.

## D. CHINA

159. The laws and regulations dealing with multimodal transport in China are contained in:

- **The Maritime Code, 1993, Chapter IV, Section 8: Special Provisions Regarding Multimodal Transport Contract;**

- **Regulations Governing International Multimodal Transport of Goods by Containers, 1997;**

- **The Contract Law, 1999, Chapter 17, Section 4: Contracts for Multimodal Transportation.**

160. It is understood that in principle, the relevant provisions of the Contract Law 1999 apply to all contracts, including contracts for multimodal transport. However, according to article 123 of chapter 8 of the same law: "If there are provisions as otherwise stipulated in respect to contracts in other laws, such provisions shall be followed." It appears that the multimodal transport contracts for carriage of goods involving a sea leg are governed by the provisions of the Maritime Code 1993. Regulations Governing International Multimodal Transport of Goods by Containers 1997 are merely rules and regulations issued by Ministries of Communication and of Railways, implementing laws promulgated by legislative bodies with a view to strengthening and controling the international multimodal transport of goods by containers. They do not, therefore, fall within the ambit of "other laws" referred to in article 123 of the Contract Law. Thus any provisions therein contrary to those of the Maritime Code or the Contract Law will be considered null and void. As there are no provisions dealing with multimodal tranport in rail, road or civil aviation laws, the multimodal transport without a sea leg will be subject to the provisions of the section 4, chapter 17 of the Contract Law, article 311 of which provides for a strict liability system for the MTO in case of concealed damage where the stage of transport in which the loss or damage took place cannot be ascertained. It is, therefore, proposed to examine the relevant provisions of these laws and regulations.

### A. Maritime Code 1993, Chapter IV, Section 8: Special Provisions Regarding Multimodal Transport Contract

161. Chapter IV, section 8 of the Maritime Code includes five articles (102 to 106). Article 102 defines an MT contract as "a contract under which the MTO undertakes to

transport the goods, against the payment of freight for the entire transport, from the place where the goods were received in his charge to destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage". Thus, the provisions of this chapter will only apply to multimodal transport contracts including a sea leg. Article 102 further describes the MTO as "the person who has entered into a multimodal transport contract with the shipper either by himself or by another person acting on his behalf."

162. **Period of responsibility:** The period of responsibility of the MTO with respect to goods, under article 103, covers "the period from the time he takes the goods in his charge to the time of their delivery."

163. **Liability of the MTO:** Under article 104, the MTO is responsible for the performance or the procurement of the performance of the MT contract and is therefore responsible for the entire transport. While the MTO may enter into separate contracts with unimodal carriers with regard to different sections of the transport under the MT contract, his responsibility with respect to the entire transport will remain unaffected.

164. **Basis of liability:** Article 105 adopts a network system of liability by providing that "if loss of or damage to the goods has occurred in a certain section of the transport, the provisions of the relevant laws and regulations governing that specific section of the multi-modal transport shall be applicable to matters concerning the liability of the MTO and the limitation thereof." Thus, if it can be determined at which stage of the transport the loss or damage occurred, the rules and regulations applicable to that leg of the transport will apply.

165. **Non-localized damage:** If, however, the loss or damage cannot be localized then according to article 106, the liability of the MTO shall be determined by the provisions governing the carrier's liability for the carriage of goods by sea. Article 106 provides:

> " If the section of transport in which the loss of or damage to the goods occurred could not be ascertained, the MTO shall be liable for compensation in accordance with the stipulations regarding the carrier's liability and the limitation thereof as set out in this chapter."

166. Chapter IV of the Maritime Code, which is to apply in determining the basis and the extent of liability of the MTO in case of non-localized damage, includes provisions dealing with the carriage of goods by sea. The basis of liability of the carrier, under section 2 of chapter IV, for loss or damage to goods, is modelled on that of the Hague/Hague/Visby Rules. The carrier is required before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship... He is bound to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." He will then be entitled to rely on the exceptions (including nautical fault and fire) provided in article 51 (mainly based on the Hague Rules exceptions) to relieve himself from liability for loss or damage to goods.

167. **Delay in delivery:** Unlike the Hague Rules, however, the carrier is held liable for delay in delivery of the goods. According to article 50, delay in delivery occurs when the goods are not delivered at the port of discharge within the time expressly agreed upon. The carrier is liable for loss of, or damage to, the goods caused by delay in delivery due to the

fault of the carrier except those causes for which the carrier is not liable under the provisions of chapter IV. The carrier is also liable for economic losses arising from delay in delivery even without actual loss of, or damage to, goods unless such economic losses occurred from causes for which the carrier was not liable. Provisions are also made for conversion of delay into total loss, and the person entitled to make a claim for the loss of goods may treat the goods as lost if they are not delivered within 60 days from the date agreed for delivery (article 50).

168. **Limitation of liability:** Article 56 limits the liability of the carrier for loss of, or damage to, the goods to an amount equivalent to 666.67 SDR per package or other shipping unit, or 2 SDR per kilogram of the gross weight of the goods lost or damaged, whichever is higher, unless the nature and value of the goods have been declared by the shipper and inserted in the bill of lading, or a higher limit has been agreed upon between the carrier and the shipper.

169. The carrier's liability for the economic loss resulting from delay in delivery of the goods is limited to an amount equivalent to the freight payable for the goods so delayed (article 57). The carrier, however, is not entitled to limit his liability if it is proved that the loss, damage or delay in delivery resulted from his act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result (article 59).

170. Chapter IV of the Maritime Code, in addition to definitions and basic principles, also include provisions dealing with shipper's responsibilities, transport documents, delivery of goods and cancellation of contract. According to article 44, "any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this chapter shall be null and void. However, such nullity and voidness shall not affect the validity of other provisions of the contract or the bill of lading or other similar documents. A clause assigning the benefit of insurance of the goods in favour of the carrier or any similar clause shall be null and void."

## B. Regulations Governing International Multimodal Transport of Goods by Containers 1997

171. The Regulations, which came into effect in 1 October 1997,[85] apply mandatorily to "the international multimodal transport of goods by containers by waterway, highway and rail."[86] The Regulations, therefore, do not cover the international MT of goods by containers by air, possibly in view of the lower frequency of such transport.

172. **Definitions:** Article 4 includes a list of definitions. "International multimodal transport of goods by containers" to which the Regulations are to apply is defined to mean "the international carriage of goods by containers from a place in one country at which the

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[85] See article 43.

[86] Article 2.

international containers[87] are taken in charge by the international MTO to a designated place of delivery situated in a different country."[88] Article 4 further includes definitions of contract for international MT of goods by containers, document for international MT of goods by containers, international MTO of goods by containers, consignor and consignee, which are mainly derived from those of the MT Convention. The term "delay in delivery" has been defined to mean "that the goods have not been delivered within the time expressly agreed upon."

173. **Liability of the MTO:** Article 27 (1) states the principle that the MTO "shall be liable for loss of or damage to or delay in delivery of the goods that happened while the goods were in his charge." Paragraph (2) permits the consignee to treat the goods as lost if they have not been delivered within "60 consecutive days following the date of delivery expressly agreed upon." Paragraph (3) adopts a network system of liability providing that:

> "Where the loss of or damage to or delay in delivery of the goods occurred in one particular stage of the multimodal transport, the MTO's liability and the limitation thereof shall be governed by the relevant laws and regulations of that particular stage of transport."

174. Thus, in case of localized damage where it can be identified at which stage of transport loss or damage occurred, then the rules and regulations governing that particular stage of transport will apply. The case of concealed damage, where the place of occurrence of damage cannot be established, is covered by paragraph (4) which provides:

> "Where the occurrence of damage to the goods cannot be attributed to a particular stage of multimodal transport, the limitation of liability of the multimodal transport operator shall be defined as follows:
>
> (a) If the multimodal transport includes the carriage by sea, the limitation of liability shall be governed by the Maritime Code of China;
>
> (b) If the multimodal transport does not include the carriage by sea, the limitation of liability shall be governed by the relevant laws and regulations."

175. Paragraph (4) only makes reference to the limitation of liability of the MTO in case of non-localized damage and not the basis of liability. The question which arises is whether in such a case, the basis of liability of the MTO will be determined according to paragraph (1) of article 27,[89] with no defences or exception available to the MTO, except for those provided in articles 18 and 19 (1) in the context of the liability of the consignor. In other words, the MTO might be liable for loss of, or damage to, the goods unless such loss or damage is caused by

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87 The term "International Containers" is defined in Article 4 (1) as "containers which comply with the technical standards issued by ISO."

88 This provision, which has been derived from the MT Convention, might be understood as making the Regulation applicable to international multimodal transport of goods between countries other than China.

89 Article 27 (1) provides that "the MTO shall be liable for loss of or damage to or delay in delivery of the goods that happened while the goods were in his charge."

the fault of the consignor. Furthermore, paragraph (4) (b) makes the limitation of liability of the MTO, in case of non-localized damage where the multimodal transport does not include carriage by sea, to be governed by the relevant laws and regulations.

176. Article 28 (1) deals with the limitation of the liability for delay in delivery in case of non-localized damage, providing that if "the multimodal transport includes a sea leg, the limitation of liability of the MTO for delay in delivery shall not exceed the freight payable under the MT contract". It goes on to state in paragraph (2) that "where the loss of or damage to the goods occurred concurrently with delay in delivery, the MTO's liability shall be that as his liability for loss of or damage to the goods."

177. Provisions dealing with the limitation of liability contained in articles 27 and 28 are to apply to any claim against the MTO for losses resulting from loss of, damage to, or delay in delivery of the goods "whether such claims are founded in contract, in tort or otherwise" (article 29).

178. Where an action is brought against the servant of the MTO for loss, damage or delay in delivery of the goods, if he can prove that "he acted within the scope of his employment, he shall be entitled to avail himself at the defences and limitation of liability which the MTO is entitled to" (article 30).

179. The MTO is not entitled to the benefit of the limitation of liability provided in article 27 and 28 if it is proved that the loss, damage or delay in delivery resulted from his act and omission done with the intent to cause such loss, damage or delay, or recklessly and with the knowledge that such loss, damage or delay would probably result (article 31).

180. **Contractual agreements:** Article 32 ensures that contractual agreements do not override the provisions of the law concerning the liability of the MTO. It provides that:

> "The MTO may enter into agreements with interested parties to agree upon the specific liabilities, rights and obligations between them as well as business arrangements concerned. However, this shall in no way affect the liability of the MTO for the multimodal transport unless laws and regulations stipulate otherwise."

181. **Documentation:** Provisions are made concerning the issuance of an MT document by the MTO upon taking the goods in his charge, including both negotiable and non-negotiable document (articles 15-16), their contents (article 14), reservations (article 23) and their evidentiary value (article 24).

182. **Liability of the consignor:** Provisions dealing with the guarantee by the consignor of the accuracy of the particulars relating to the description and general nature of the goods are mainly derived from those of the MT Convention (articles 17 and 19). The consignor is specifically made liable for loss of, or damage to, the goods as well as losses sustained by the MTO, if such loss or damage results from the following causes:

> "1. The container body and seal are good and intact, the goods were counted, packed and sealed by the consignor or shipped in the consignor's container;

2. Inferior quality of the goods, or shortage or deterioration of packed goods, while the external packing appears to be in good condition;

3. Insufficiency or illegibility of marks, or inadequacy of packing" (article 18).

183. Furthermore, the consignor is also liable for any loss sustained by the MTO or a third party if such loss is caused by his fault or neglect (article 19). Provisions are also included covering duties and liabilities of the consignor for carriage of dangerous goods (article 20).

184. **Time-bar:** According to article 34 (1), where the multimodal transport includes a sea leg, any action against the MTO shall be time-barred if proceedings have not been instituted within a period of one year. This period is extended to two years where there is no sea carriage involved and an action is brought against the MTO under the General Rules of Civil Law. The limitation period commences from the day following which the goods were delivered or should have been delivered by the MTO (article 34 (2)).

185. It is further clarified that the provisions of article 34 "shall not affect the limitation of action of a claimant who has the right to institute an action in accordance with the laws and regulations of the stage of multimodal transport where loss of or damage to the goods can be attributed" (article 34 (3)). Provisions dealing with the time limit for a recourse action by the MTO against a third party follow those of the MT Convention (article 34 (4)).

186. Chapter 2, dealing with regulation and control of multimodal transport, includes provisions covering conditions for the operation of the MTOs as well as requirements for licensing.

### C. Contract Law, 1999

187. Section 4 of chapter 17 of the Contract Law covers contracts for multimodal transportation and includes five articles (317 to 321). Article 317 provides that: "A multimodal transportation business operator shall be responsible for the performance of the multimodal transportation contract, enjoy the rights and assume the obligations of the carrier for the entire transport." Article 318 envisages the possibility of a "multimodal transportation business operator" entering into agreements with the unimodal carriers participating with multimodal transportation "on their respective responsibilities for different sections under the multimodal transportation contract."

188. The obligation of the multimodal transportation business operator "to issue multimodal transportation document" upon receiving the goods from the shipper, is provided in article 319. At the option of the shipper, such a document may be negotiable or non-negotiable.

189. The shipper is held liable, under article 320, for any loss suffered by the "multimodal transportation business operator" as the result of his fault, even if he has transferred the "multimodal transportation document" to other parties.

190. **Liability of the MTO:** Concerning the liability of the MTO, article 321 adopts the network system of liability providing that:

> "Where the damage to, destruction or loss of goods occurs in a specific section of the multimodal transportation, the liability of the multimodal transportation business operator for damages and the limit thereof shall be governed by the relevant laws in the specific model of transportation used in the specific section. Where the section of transportation in which the damage or destruction or loss occurred can not be identified, the liability for damages shall be governed by the provisions of this chapter."

191. Thus, if it can be established at which stage of transport the loss or damage took place, then the rules and regulations applicable to that specific mode of transport will be applied in determining the liability of the MTO. In case of non-localized damage, however, where it is not known at which leg of carriage the loss or damage occurred, the provisions of chapter 17 of the contract law will govern the liability of the MTO.

192. Provisions of section 3 of chapter 17, dealing with "contracts for goods transportation" would, therefore, apply in cases of non-localized damage. Article 311, which deals with the liability of the carrier, provides:

> "A carrier shall be liable for damages for the damage to or destruction of goods during the period of carriage unless the carrier proves that the damage to or destruction of goods is caused by *force majeure*, by inherent natural character of the goods, by reasonable loss, or by the fault on the part of the shipper or consignee."

193. Provisions concerning the assessment of compensation for loss or damage to goods are included in article 312, which states:

> "The amount of damages for the damage to or destruction of the goods shall be the amount as agreed on the contract by the parties where there is such an agreement. Where there is no such an agreement or such agreement is unclear, nor can it be determined according to the provisions of article 61 of this law,[90] the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied. Where the laws or administrative regulations stipulate otherwise on the method of calculation of damages and on the ceiling of the amount of damages, those provisions shall be followed."

194. Section 3 also includes provisions dealing with issues such as the rights and obligations of the shipper, liability of the contracting carrier, freight in case of non-delivery of the goods due to *force majeure* and carrier's lien on the goods for non-payment of freight and other charges.

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[90] Article 61 provides: "Where, after the contract becomes effective, there is no agreement in the contract between the parties on the terms regarding quality, price or renumeration and place of performance, etc. or such agreement is unclear, the parties may agree upon supplementary terms through consultation. In case of a failure in doing so, the terms shall be determined from the context of relevant clauses of the contract or by transaction practices."

## E. COLOMBIA

195. As a member State of the Andean Pact, Colombia has implemented Andean Community Decisions 331 and 393, concerning international multimodal transport, as well as Resolution 425 of 20 August 1996, concerning the registration scheme for MTOs. Furthermore, by Decree No. 149 of 21 January 1999, Colombia has enacted legislation to regulate the MTOs registration and licensing system.[91]

## F. ECUADOR

196. As a member State of the Andean Pact, Ecuador has implemented Andean Community Decisions 331 and 393, concerning international multimodal transport, as well as Resolution 425, concerning the registration scheme for MTOs.[92]

## G. EGYPT

197. According to the information received from the Government, the Ministry of Transportation in Egypt is currently drafting a law containing the rules governing multimodal transport operations at the national level. The provisions of the draft law seem to follow those of the MT Convention. A ministerial ordinance is also being prepared, setting out the conditions and regulations concerning the establishment of a licensing system for the operation of the MTO in Egypt. The application of the system is considered to necessitate the establishment of an appropriate legislative environment based on the following principal requirements:

(a) a review of the transport laws and regulations in force in Egypt, including the extent of their conformity with the international transport system;

(b) a study of the possibility of Egypt's accession to the international multimodal transport instruments, particularly the customs and transit conventions and the Convention on International Multimodal Transport of Goods to which Egypt has not yet become a party;

(c) the promulgation of special legislation regulating international multimodal transport in Egypt.

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91 For Andean Community legislation, see paragraphs 47-69.

92 For Andean Community legislation, see paragraphs 47-69.

## H. GERMANY

### Transport Law Reform Act 1998[93]

198. The German Transport Law underwent a substantial change by the entry into force of the new Transport Law Reform Act on 1 July 1998. While until then, each mode of transport was subject to different rules and regulations, the provisions of the new Act apply to all modes of transport with the exception of maritime transport. Thus, the Act, which is based on the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR), applies in a uniform manner to carriage of goods "over land, on inland waterways or by aircraft."[94] It also applies to multimodal transport of goods including a sea leg.

199. Section 452 of the third sub-chapter includes specific provisions dealing with multimodal transport, under the title "Carriage Using Various Modes of Transport." Section 452 makes the general rules governing the contract of carriage also applicable to multimodal transport in the same way as for the other modes of transportation, except for cases of localized damage and where the provisions of relevant international conventions apply. It provides:

> "If carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if, had separate contracts been concluded between the parties for each part of the carriage which involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of the first sub-chapter shall apply to the contract, unless thefollowing special provisions or applicable international conventions provide otherwise. This also applies if part of the carriage is performed by sea."

200. Thus, the new Act adopts the "network system" of liability, making the general provisions of the first sub-chapter on the contract of carriage applicable to cases of non-localized damage where the place of the occurrence of the loss or damage is not known, while in cases of localized damage the liability of the carrier is to be governed by the legal provisions applicable to the specific mode of transport during which the damage occurred. Section 452a states:

> "If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific leg of the carriage, the liability of the carrier shall, contrary to the provisions of the first sub-chapter, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this leg of carriage. The burden of proving that the loss, damage or event which caused delay in delivery occurred on a particular leg of carriage is borne by the person alleging this."

201. According to section 452d (2), however, the parties may agree that even in cases where the place of damage is known (localized damage), liability is to be governed by the

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[93] See the German Commercial Code (Extract: Freight Business, Forwarding Business, Warehousing Business), as revised by the Act dated 25 June 1998 to Reform the Law on Freight, Forwarding and Warehousing (Transport Law Reform Act).

[94] See Chapter Four, First Sub-chapter, General Provisions, Section 407.

general provisions of the first sub-chapter. Moreover, they may agree on different liability rules if and to the extent the applicable law allows for freedom of contract (section 452d (1), first sentence). However, agreements "purporting to exclude the application of a mandatory provision of an international convention binding on the Federal Republic of Germany applicable to a leg of carriage are ineffective" (Section 452 d (3)).

202. Furthermore, according to section 452b (1), section 438 of the general provisions dealing with notice of damage "applies irrespective of whether the place of damage is unknown, is known or becomes known later. The form and time limit prescribed for the notice of damage shall be deemed to have been observed as well if the corresponding provisions which would have been applicable to a contract of carriage covering the last leg of the carriage have been complied with."

203. As regards limitation, section 452b (2) goes on to state that:

> "When the limitation period for claims based upon loss, damage or delay in delivery runs from delivery, delivery to the consignee is the relevant point of time. Even if the place where the damage occurred is known, the claim shall be time-barred in accordance with section 439 [of general provisions] at the earliest."

204. According to section 452d (1), the first sentence of section 452b (2), relating to limitation, may be modified by an agreement of the parties other than an agreement on the basis of standard form contractual conditions.

205. As stated earlier, general provisions of the first sub-chapter apply to all modes of transport (except maritime transport) as well as to multimodal transport contracts in cases where the stage of transport in which the damage occurred is not known. Their scope may also be extended, by contractual agreements, to apply to MT contracts where damage is localized (section 452d (2)). It is, therefore, proposed to briefly examine some of the provisions of this sub-chapter.

206. The first sub-chapter provides a relatively comprehensive set of provisions covering issues such as loading/unloading, delivery, calculation/payment of freight, lien, consignment note, its contents and evidentiary effect, consignment bill, its characteristic as a document of title, delivery without presentation of consignment bill, shipment of dangerous goods, liability, time-bar, jurisdiction, liability of the sender, notice of damage, assessment of compensation for loss or damage, actual carrier, successive carriers.

207. **Basis of liability:** Provisions dealing with carrier's liability for loss or damage to goods are mainly based on those of the CMR. According to section 425 (1) the "carrier is liable for any damage resulting from loss of or damage to the goods, occurring during the time between the taking over of the goods and their delivery, or resulting from delay in delivery." The carrier is, however, "relieved from liability in so far as the loss, damage or delay in delivery was caused by circumstances which the carrier could not avoid even by exercising the utmost diligence and the consequences of which he was unable to prevent".[95] The Act further goes on to specify the following grounds for exclusion of the carrier's liability:

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[95] Section 426.

" 1. Use of an open, unsheeted vehicle or loading on deck, if such a mode of carriage had been agreed or was customary;

2. Insufficient packaging by the sender;

3. Handling, loading or unloading of the goods by the sender or consignee;

4. Nature of the goods which particularly exposes them to damage, especially through breakage, rust, decay, desiccation, leakage or normal wastage;

5. Insufficient labelling of packages by the sender;

6. Carriage of livestock."[96]

208. The carrier can rely on these exceptions, if he can prove the presence of such circumstance and the possibility of causality between such circumstance and the damage occurred.

209. **Limitation of liability:** The carrier's liability for loss of, or damage to, goods is limited to an amount of 8.33 SDR for each kilogram of gross weight of the goods lost or damaged.[97] This amount may be modified by an agreement "reached after detailed negotiations" (section 449 paragraph 2, first sentence). The parties are, however, permitted to modify such amount even by use of standard form contractual conditions, if this amount:

- is between 2 and 40 SDR and is given a prominent appearance by a special printing technique; or

- "is less favourable to the user of the standard form contractual conditions than the amount provided for in section 431 paragraphs 1 and 2."[98]

210. The carrier's limit of liability for delay in delivery is fixed at an amount equal to three times the freight (section 431 (3)). This amount may be modified only by an agreement reached after detailed negotiations (section 449 paragraph 2, first sentence).

211. According to section 435, the carrier shall, however, lose in any event the right to limit his liability if the damage results from an act or omission of his own, or of his servants and agents, done with the intent to cause such damage, or recklessly and with the knowledge that the damage would probably result.

212. **Time-bar:** Any action relating to carriage of goods to which the provisions of the sub-chapter apply are time-barred within a period of one year from the date of delivery of the

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96 Section 427 (1).

97 Section 431 (1) and (2). As to the assessment of the compensation for loss of, or damage to, goods, see sections 429, 430 and 432.

98 Section 449 (2).

goods, and if the goods are not delivered, from the date on which they should have been delivered. The limitation period is extended to three years in cases of fault or intent to cause loss or damage.[99]

213. **Jurisdiction:** According to section 440, the courts of the place in which the goods were received for carriage or the place designated for their delivery have jurisdiction to hear disputes arising from the carriage to which the provisions of the sub-chapter apply.

214. **Documentation:** According to section 408 paragraph 1, the carrier may require a consignment note to be issued by the sender. The carrier may himself also issue a consignment bill, which is a transport document similar to marine bills of lading and is used in Germany for road, rail and inland waterway transport (see section 444).

## I. INDIA

### Multimodal Transportation of Goods Act, 1993 (No. 28 of 1993)[100]

215. India's Multimodal Transportation of Goods Act 1993 provides for "the regulation of the multimodal transportation of goods, from any place in India to a place outside India, on the basis of a multimodal transport contract and for matters connected therewith or incidental thereto." The Act defines the term "multimodal transportation" as the "carriage of goods by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India" (section 2 (k)). The Act also includes provisions for regulation and conditions for registration of the MTOs.[101]

216. **Definitions:** The list of definitions provided in section 2 includes those of the terms carrier, consignee, consignment, consignor, delivery, endorsee, endorsement, goods, mode of transport, MT contract, MTO, as well as negotiable and non-negotiable multimodal transport documents. No definition of an MT document itself is provided, and the MT contract is merely defined as "a contract entered into by the consignor and the MTO for multimodal transportation" (section 2 (l)).

217. **Documentation:** Provisions of chapter III of the Act, dealing with the issuance of the MT document, its contents, reservations and evidentiary effect as well as the responsibility of the consignor, are mainly derived from the MT Convention.[102]

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[99] Section 439 (1) and (2).

[100] It is understood that the Act is currently in the process of being amended.

[101] See chapter II of the Act.

[102] Except section 8, paragraph (1) of which provides that "every consignee named in the negotiable or non-negotiable MT document and every endorsee of such document, as the case may be, to whom the property in the goods mentioned therein shall pass, upon or by reason of such consignment or endorsement, shall have all the rights and liabilities of the consignor."

**Liability of the MTO**

218. **Basis of liability:** The MTO is liable for any loss of, damage to, or delay in delivery of, the consignment as well as any consequential loss or damage arising from such delay, if such loss, damage or delay took place while the goods were in his charge. The MTO, however, is not to be liable if he proves that no fault or neglect on his part or that of his servants and agents, had caused or contributed to such loss, damage or delay in delivery (section 13 (1)). While it is evident from the provision of section 13 (1) that the MTO is liable for loss, damage or delay while the goods are in his charge, there is no provision specifically setting out period of responsibility of the MTO.

219. **Localized damage:** Provisions of section 13 (1) seem to govern the liability of the MTO both in cases of localized and non-localized damage, since the section 15 of the Act makes only the limits of liability of the MTO subject to the relevant law applicable to the stage of transport during which the loss or damage is known to have occurred (i.e. modified network system).

220. **Delay in delivery:** Similar to the UNCTAD/ICC Rules, the MTO is only liable for loss or damage arising from delay if the consignor has made a declaration of interest in timely delivery, which had been accepted by the MTO (section 13 (1)). The definition of "delay in delivery" is provided by way of explanation to the relevant section of the Act, that is section 13 (1). The claimant may treat the consignment as lost if it has not been delivered within ninety consecutive days following the date expressly agreed for delivery or the date it should have been reasonably expected to be delivered.[103]

221. **Limitation in liability:** Provisions dealing with the limitation of liability of the MTO for loss, damage or delay is based on the UNCTAD/ICC Rules. Thus, the MTO's liability is limited to 2 SDR per kilogram of the gross weight of the consignment lost or damaged, or 666.67 SDR per package or unit, whichever is the higher. And if according to the MT contract, no carriage by sea or by inland waterways is involved, the liability limit is increased to 8.33 SDR per kilogram of the goods lost or damaged (section 14 (1) (2)).

222. In case of localized damage, unless the nature and value of the goods have been declared before they have been taken in charge by the MTO, the limit of liability of the MTO for loss or damage will be determined in accordance with the provisions of the relevant laws applicable to the mode of transport during which the loss or damage occurred. Any stipulation to the contrary in the MT contract shall be void and unenforceable.[104]

223. The MTO's liability for delay in delivery and any consequential loss or damage arising from such delay, is limited to the freight payable for the delayed consignment (section 16). Similarly provisions dealing with the assessment of compensation for loss or damage,

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103 See section 13 (2); See also the MT Convention, article 16 (3); and Rule 5.3 of the UNCTAD/ICC Rules.

104 Section 15.

loss of right to limit liability, the aggregate liability of the MTO and notice of loss or damage to goods, are based on those of the UNCTAD/ICC Rules.[105]

224. The Act also includes, in section 21, special rules dealing with the shipment of dangerous goods which are based on those of the MTC.[106]

225. **Jurisdiction:** Provisions of section 25, dealing with jurisdiction, are based on those of article 26 (1) of the MT Convention, giving the claimant a wide option for instituting an action.

226. **Arbitration:** As far as the arbitration is concerned it is merely provided that the parties to a MT contract may agree to submit any dispute relating to multimodal transportation under the Act to arbitration. The place of, and procedure for, such arbitration is left to be specified in the MT document (section 26).

227. **Time-bar:** Similar to the UNCTAD/ICC Rules, a period of nine months has been fixed for instituting an action, under the provisions of the Act, against the MTO. The limitation period commences from the time of delivery of the goods, the date they should have been delivered, or the date on which the party entitled to receive the goods could treat them as lost (section 24).

228. **Lien:** Provisions are also made concerning the MTO's in right of lien, for payment of freight under the MT contract, on the goods and on the document in his possession. Furthermore, non-delivery of the goods in the exercise of the MTO's right of lien is not to be considered as delay in delivery (section 22).

229. The Act is to override any other enactment and is to have effect notwithstanding anything inconsistent therewith contained in any other law (section 29). Thus, an MT contract inconsistent with the provisions of the Act shall be void and unenforceable (section 28).

## J. MEXICO

230. Mexico, being a party to the United Nations Convention on International Multimodal Transport of Goods, 1980, has promulgated the text of the Convention, published in "Diario Oficial" on 27 April 1982. It has further enacted the following regulation:

### Regulation on International Multimodal Transport, 6 July 1989, published in "Diario Oficial" on 7 July 1989[107]

231. The Regulation applies to the international MT of goods including provisions covering various activities and regulation of the MTOs such as the provision of compulsory

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105 See sections 17 to 20.

106 See article 23 (2) of the MT Convention.

107 The Regulation which came into force as of 8 July 1989, repealed the previous Regulation on the subject, published in "Diario Oficial" of 16 August 1982.

liability insurance.[108] The Regulation does not provide for definition of the terms used in the text except for that of the MTO (article 7). It does not include provisions dealing with issues such as limitation of liability, claims and actions including time-bar and jurisdiction. The following is a brief account of the substantive provisions of the Regulation:

232. **Documentation:** Provisions are included requiring the standard MT document used by the MTO to be submitted for approval by the Secretary of Communication and Transport in order to have any legal value.[109] According to article 15, if the MTO, or a person acting on his behalf, has reasonable grounds to suspect that the merchant/shipper has not provided the necessary information for the performance of the international MT contract, or has reasonable grounds to suspect that the information provided does not accurately represent the goods actually taken in charge, or has no reasonable means of checking such particulars, the MTO or the person acting on his behalf could insert in the international MT document a reservation specifying the inaccuracies, grounds for suspicion or the absence of reasonable means of checking. If the MTO, or the person acting on his behalf, fails to note the apparent condition of the goods on the MT document, he is deemed to have received the goods in apparent good condition (article 7). Article 18, which includes provisions concerning the particulars contained in the MT document, requires a specific reference in the document as to the application of this Regulation to the international multimodal transport of goods.[110] The issuance of an international MT document is independent of any other document that might be issued by unimodal carriers in conformity with the applicable legislation (article 19).

233. **Liability of the MTO:** According to article 10, the responsibility of the MTO covers the period from the time the goods are in his charge, or in charge of any of his representatives or agents, until the time of their delivery to the consignee in accordance with the law governing each mode of transport. The international MTO is liable for loss of, or damage to, the goods and for delay in delivery of the goods.

234. The MTO, however, is not liable for loss, damage or delay caused by: latent defect of the goods, fortuitous event or *force majeure* (article 12). Under article 11, the MTO has the right to institute a recourse action against any of the unimodal carriers or subcontractors responsible for the casuality.

## K. NETHERLANDS

235. Multimodal or combined transport in the Netherlands is governed by the provisions of the Dutch Civil Code.[111] Articles 40 to 43 of the Civil Code provide the core provisions of Dutch legislation on multimodal transport. Article 40 defines the contract of combined transport as follows:

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108 Articles 1, 3, 5, 6, 8 and 9.

109 Article 9 (c).

110 See article 18 (n).

111 See book 8, title 2, section 2, articles 40 to 52 and article 1722.

"The contract of combined carriage of goods whereby the carrier (combined transport operator) binds himself towards the consignor in one and the same contract, to the effect that carriage will take place in part by sea, inland waterway, road, rail, air, pipeline or by means of any other mode of transport."

236. **Liability of the combined transport operator (CTO):** Article 41 of the Civil Code adopts a network system of liability providing that:

"In a contract of combined carriage of goods, each part of the carriage is governed by the judicial rules applicable to that part."

237. Thus, in case of loss of, or damage to, goods, it will be necessary to determine at which stage of transport the loss occurred in order to establish the applicable law. If, however, the loss or damage cannot be localized and it is not clear which leg of transport the loss or damage occurred, then article 42 of the Civil Code applies. It provides:

"1. If the combined transport operator does not deliver the goods to destination without delay and in the state in which he has received them, and if it has not been as ascertained where the fact causing the loss, damage or delay has arisen, he is liable for the damage resulting therefrom, unless he proves that he is not liable therefore on any of the parts of the transport where the loss, damage or delay may have occurred.

2. Any stipulation derogating from this articles is null."

238. Article 43 provides for the law to be applied in determining the extent of liability of the CTO. It states:

"1. If the combined transport operator is liable for the damage resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading hereto has arisen, his liability is determined according to the juridicial rules which apply to that part or to those parts of the transport where this fact may have arisen and from which the highest amount of damage results.

2. Any stipulation derogating from this articles is null."

239. Thus, if loss or damage occurs during a combined transport involving road, rail, sea and air transport and it cannot be established at what stage of carriage the damage took place, then the liability of the combined transport operator will be determined by the rules and regulations governing the mode of transport which impose the highest level of liability on the operator. Furthermore, paragraph (2) of article 43 makes this provision mandatory and any agreement to the contrary by the parties will be considered null and void.

240. **Time-bar:** Article 1722 (book 8) of the Civil Code regulates the question of limitation periods. It provides:

"1. Articles seventeen hundred and ten and seventeen hundred and twenty-one inclusive apply to contracts of combined carriage of goods, upon the understanding that the consignor also includes the holder of a CT document, and that the day of

delivery includes the day of delivery under the contract of combined carriage of goods."

241. Paragraph (2) of article 1722 specifically deals with the cases where the loss is not localized. It provides:

"2. If, in a contract of combined carriage of goods, the person instituting the action does not know where the fact giving rise to the action has occurred, that relevant provision regarding prescription or lapse of time is applied which is most favourable to him."

242. Paragraph (3) makes this provision mandatory by providing that "Any stipulation derogating from paragraph two of this article is null."

243. Thus, in case of non-localized damage the limitation period most favourable to the claimant, that is the longest time limit within the rules and regulations applicable to various modes of transport, will apply. It appears from the above provisions (including articles 42 and 43) that a relatively high level of liability is imposed on the combined transport operator in cases where the loss cannot be localized.

244. Articles 44 to 52 of the Civil Code also include provisions concerning the "combined transport document", covering issues such as the contents of the CT document, its evidentiary value and issuance of negotiable and non-negotiable documents. It seems, however, that " the issue of such a CT document is not a prerequisite for the applicability of the regulations relating to the multimodal transport agreement, but the legislature has provided the option of using such a document in the framework of this type of agreement."[112]

## L. PARAGUAY

245. As a member State of MERCOSUR, Paraguay has implemented the MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport by Decree No. 16.927 of 16 April 1997.[113]

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112 Pim Van Rossenberg, paper delivered at the IBA Conference, Barcelona, September 1999, p.5.

113 For MERCOSUR legislation, see paragraphs. 70-88.

## Chapter IV

## SUMMARY AND CONCLUSIONS

246. This document attempts to provide an overview of the laws and regulations on multimodal transport enacted at the regional, subregional and national level. As it appears from the study, some jurisdictions have adopted the network liability system making the liability of the MTO, in case of localized damage, subject to the provisions of mandatory international convention or national law applicable to the particular stage of transport during which the loss or damage occurred. Thus, the liability of the MTO changes depending on where the loss or damage takes place. In case of non-localized damage the MTO's liability is often made subject to general provisions of the law, which may not be easily determined in every case.

247. A number of legislations, following the approach of the MT Convention, adopt modified network liability system based on presumed fault or neglect. These laws derive extensively from the provisions of the MT Convention and of the UNCTAD/ICC Rules for Multimodal Transport Documents.[114]

248. In general, these laws and regulations apply to multimodal transport contracts when the place of taking in charge, or delivery, of the goods is located in the country enacting the law. That is to say that such laws and regulations have a much wider scope of application and are not confined to the particular country or the region.

249. The enacted laws and regulations are in general of mandatory nature and often specifically provide that any contractual stipulations to the contrary are null and void. Thus, standard terms and conditions may not be used to derogate from these laws.

250. Regional and subregional organizations within Latin America have overlapping memberships. Some countries are members of more than one organization. These organizations have produced multimodal transport laws and legislation for their member countries, which are not entirely uniform but vary in approach to certain essential issues.[115] Some countries, while being members of more than one organization, have also enacted legislation differing from those enacted by member organizations. Thus, the question of which law applies in a particular case becomes an important issue.

251. Clearly the desire to reach uniformity of the law governing multimodal transport is far from being achieved. The present situation may be characterized by uncertainty as to the law applicable to multimodal transport operations. The lack of a uniform liability regime in force, diverse national laws and regulations including varying approaches on central issues such as the liability system, limits of liability, time-bar, etc., make it difficult for the parties to assess in advance the risks involved.

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114 It should be noted that UNCTAD/ICC Rules were prepared with a view to their incorporation into contracts for carriage of goods and were not meant to be used as a model law in enacting mandatory national laws. Particular attention would need to be given in incorporating contractual provisions such as UNCTAD/ICC Rules into mandatory national laws to ensure, that in conjunction with provisions derived from the MT Convention, they do not produce unintended consequences.

115 See chapter II.

252. The problem also arises if the loss is not localized and the stage of transport where the loss or damage occurred is not identified. In practice, standard terms documents which include varying liability provisions are normally used, but since these are contractual, they are usually subject to mandatory and divergent national laws and regulations. The situation is even more complicated where the damage has occurred gradually and during the entire process of transportation.

253. The present disunified and highly unsatisfactory situation regarding cargo liability regimes in general and multimodal transport in particular, has prompted a number of organizations to initiate investigations into possible measures to improve the situation. The solutions proposed vary from the preparation of a new set of model laws, to a mandatory international convention or a non-mandatory international convention, similar to the UN Convention on the International Sale of Goods 1980, to apply by default. It is recognized that model laws applicable by parties' contractual agreement or a non-mandatory international regime would be more widely acceptable but they would not be effective in promoting uniformity. While a mandatory international convention would, in principle, be the best means of creating international uniformity, experience has shown that international conventions are difficult to negotiate and very slow to enter into force. After twenty years, the UN Convention on International Multimodal Transport of Goods has not entered into force and is unlikely to do so in the near future, although a significant proportion of its provisions have been used in the preparation of a number of national and regional/subregional legislation.

254. However, the nature and scope of any possible course of action would need to be decided at a global level and with the involvement and participation of all interested parties. The adoption of individual national or regional solutions would contribute to already existing uncertainty and lack of uniformity and thus work to the detriment of the international community. International coordination and cooperation are essential in order to arrive at a widely acceptable solution.